Supreme Court, U.S.
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No. 93-

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA, et al.,

Appellants,

vs.

RAY HAYS, et al.,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The Western District Of Louisiana

JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF LOUISIANA, ET AL.

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QUESTIONS PRESENTED

(1) Did the District Court err in extending the prohibition of *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), to apply to *any* consideration of race in redistricting?

(2) Did the District Court err in holding that a decision of the Attorney General to deny preclearance under the Voting Rights Act, by statute reviewable only in the District Court in the District of Columbia, may be collaterally attacked in any other federal or state court in the nation?

(3) Did the District Court err in holding that the deliberate creation of a predominantly non-white district more than 55% non-white is unconstitutional as a matter of law because it contains an excessive number of non-white voters?

(4) Did the District Court err in holding that a state, where constitutionally permitted to deliberately create a predominantly non-white district, must in doing so disregard all traditional districting considerations other than compactness?

(5) Did the District Court err in holding that the plaintiffs in this case have standing in the absence of any finding or evidence that the Louisiana districting plan has actually injured any of the plaintiffs?

(6) Did the District Court err in holding that the State of Louisiana's congressional reapportionment plan, as embodied in Act 42 of the 1992 Regular Session of the Louisiana Legislature, was violative of the plaintiffs'

QUESTION PRESENTED – Continued

rights to Equal Protection as guaranteed by the United States Constitution?*

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* Actual parties to this proceeding in the United States District Court were:

(1) Ray Hays, appellee herein
(2) Edward L. Adams, appellee herein
(3) Susan Shaw Singleton, appellee herein
(4) Gary Stokely, appellee herein
(5) The State of Louisiana, appellant herein
(6) Edwin W. Edwards, in his official capacity as Governor of the State of Louisiana, appellant herein
(7) Samuel B. Nunez, Jr., in his official capacity as President of the Louisiana State Senate, appellant herein
(8) John A. Alario, in his official capacity as Speaker of the Louisiana House of Representatives, appellant herein
(9) W. Fox McKeithen, in his official capacity as Secretary of State for the State of Louisiana, appellant herein
(10) Jerry Fowler, in his official capacity as Commissioner of Elections for the State of Louisiana, appellant herein

In addition, the following parties were denied intervention, but allowed to participate in the court below as amici curiae:

(1) The Louisiana Legislative Black Caucus
(2) Richard Baker and Clyde Holloway
(3) Bernadine St. Cyr, Calvin Wilkerson, Ed Jones, Hazel J. Freeman, Aaron Walker, Donald Thibodeaux, Zelms Wyche, Patrick Fontenot, Janice Frazier.

The United State of America also participated in the court below as amicus curiae.

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STATE OF LOUISIANA, et al.,

Appellants,

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RAY HAYS, et al.,

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On Appeal From A Three-Judge Panel Of The United States District Court For The Western District Of Louisiana

JURISDICTIONAL STATEMENT ON BEHALF OF THE STATE OF LOUISIANA, ET AL.

Appellants, the State of Louisiana, its Governor, Secretary of State, Commissioner of Elections, Senate President and Speaker of its House of Representatives, pray that an order be entered noting probable jurisdiction of its appeal from the decree of a three-judge panel of the United States District Court of the Western District of Louisiana, entered in this cause on December 28, 1993 declaring that Act 42 of the 1992 Regular Session of the Louisiana Legislature, which provided for the re-apportionment and redistricting of the State of Louisiana's congressional districts, violated the plaintiffs' right to

equal protection as guaranteed by the United States Constitution.

OPINIONS BELOW

The August 27, 1992 order of the three-judge court is unreported. (Appendix A, p. 1).

The December 28, 1993 opinion of the three-judge court is reported at 839 F. Supp. 1188 (W.D. La. 1993). (Appendix B, p. 3).

JURISDICTION

This action was brought by four citizens of the State of Louisiana against the State of Louisiana, its Governor, Secretary of State, Commissioner of Elections, Senate President and Speaker of its House of Representatives, alleging that Louisiana's congressional reapportionment plan, as embodied in Act 42 of the 1992 Regular Session of the Louisiana Legislature, violated the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection and Due Process Clauses of the United States and Louisiana Constitutions. This action was heard by a three judge court pursuant to 28 U.S.C. § 2284, which requires a district court of three judges when an action is filed challenging the constitutionality of the apportionment of congressional districts. On December 28, 1993 a three judge court for the Western District of Louisiana rendered a judgment declaring that the reapportionment plan contained in Act 42 violated the plaintiffs' right to equal protection as

guaranteed by the United States Constitution, and enjoined the State of Louisiana from holding any future congressional elections utilizing that plan.

The appellants filed a Notice of Appeal, seeking review of that decision by this Court, on January 26, 1994. (Appendix E) Jurisdiction properly lies in this Court under 28 U.S.C. § 1253, which allows an appeal to this Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Louisiana Statute that was invalidated and enjoined from enforcement by the district court's decision is Act 42 of the 1992 Regular Session of the Louisiana legislature. (Appendix C, p. 76)

U.S. Constitution, Fourteenth Amendment, Section 1 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a congressional reapportionment case. It involves a challenge to Act 42 of the 1992 Regular Session of the Louisiana Legislature, which establishes the districts by which Louisiana is to elect its members of the United States House of Representatives. The plaintiffs alleged that the congressional districts created by Act 42 violated the Voting Rights Act, 42 U.S.C. § 1973, and the Equal Protection and Due Process Clauses of the Constitutions of the United States and state of Louisiana. This case presents this Court with the first case tried on the merits of a claim first recognized in this Court's decision in *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

This matter arises out of the state of Louisiana's redistricting of its congressional districts based on the 1990 census. As a result of that census, the number of representatives to the United States House of Representatives apportioned to Louisiana was decreased from eight to seven.

In the 1991 Regular Session of the Louisiana legislature, the state had passed legislation to redistrict its Board of Elementary and Secondary Education (BESE), whose boundaries have historically paralleled congressional district lines. The BESE redistricting plan created eight election districts in the state, only one of which contained a majority black voter population. The plan was submitted to the United States Justice Department for preclearance pursuant to Section 5 of the Voting Rights Act. Preclearance was denied, based upon the plan's failure to include a second majority black district.

The plan redistricting the state senate was also submitted and rejected because of its failure to contain additional majority black districts.

Based upon these earlier denials of preclearance, the legislature knew that in order to obtain preclearance from the United States Attorney General, its congressional redistricting plan would necessarily have to include two majority black districts. Act 42 was enacted by the legislature, and includes seven congressional districts, two of which, District 2 and District 4, are majority black.

This case was first heard, on plaintiffs' motion for preliminary injunction, on August 26-27, 1992 before a three-judge court for the Western District of Louisiana. The plaintiffs sought to prohibit the implementation of Act 42's reapportionment plan for the 1992 congressional elections. At the completion of the hearing, the district court ruled that Act 42 did not violate the plaintiffs' Due Process and Equal Protection guarantees under either the United States or Louisiana Constitutions. The court refused to enjoin the implementation of Act 42's reapportionment plan for the 1992 congressional elections, but took under advisement the plaintiffs' claims brought pursuant to section 2 of the Voting Rights Act, 42 U.S.C. § 1973. (See Appendix A, p. 1).

Shortly after this Court's decision in *Shaw v. Reno*, the district court ordered a second hearing on the plaintiffs' claims for injunctive relief. The court below rescinded its previous ruling, and a new hearing was held on August 19-20, 1993. Various parties attempted to intervene in the matter. The court denied the motions for intervention, but

allowed those parties to participate as amicus curiae. One group of intervenors appealed the denial to the United States Fifth Circuit Court of Appeals, *Ray Hays, et al. vs. State of Louisiana, et al.*, No. 93-5192. That appeal is still pending.

The focus of the new hearing was whether Act 42's reapportionment plan was valid under the criteria set forth in *Shaw*. The state of Louisiana introduced evidence at the hearing to establish that (1) the shape of the congressional districts created by Act 42 were not solely a result of race, (2) the state had a compelling interest in providing two districts in which African-Americans had a reasonable opportunity to elect candidates of their choice, (3) the majority African-American districts created by Act 42 had a commonality of interests other than the race of their voters, (4) the districts were sufficiently narrowly tailored to achieve the objective of affording the African-American citizens a reasonable opportunity to elect candidates of their choice, and (5) that Louisiana has had a long history of racial discrimination, that voting in Louisiana is polarized along racial lines and that minority voters are politically cohesive.

The evidence demonstrated that Louisiana's legislature knew that any reapportionment plan it adopted would have to contain two majority-minority districts in order to receive preclearance by the United States Justice Department. This knowledge was based upon the United States Justice Department's earlier objections to redistricting plans pertaining to a state education board and the state senate. The evidence also indicated that more

compact majority-minority districts than those included in the state's congressional redistricting plan could have been drawn. The state demonstrated that political considerations, such as incumbency protection and partisanship, caused the districts ultimately included in the state's plan to be less compact and more irregularly shaped.

The District Court, on December 28, 1993, rendered its decision, holding that the state of Louisiana's congressional reapportionment plan violated the plaintiffs' guarantees of equal protection as provided by the United States Constitution. The court disregarded as legally irrelevant the evidence introduced by the state that explained the shape of the challenged districts, and without specifically deciding whether Louisiana had a compelling state interest in creating two majority-minority districts, held that if two districts were required, the districts created by Act 42 were not narrowly tailored to accomplish that end.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Last Term in *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), this Court addressed in a cautious and limited manner the unavoidably "complex and sensitive issues" raised by race-based districting designed to benefit members of historically disadvantaged minority groups. 113 S.Ct. at 2819. *Shaw* deliberately decided only the question of whether a claim was stated under the Fourteenth Amendment by an allegation that a districting

plan was "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S.Ct. at 2824. *Shaw* expressly declined to decide whether any other type claims might exist under the Equal Protection Clause, or what types of justifications might be sufficient to defeat constitutional challenges of these sorts.

The district court opinion in this case expressly and somewhat enthusiastically undertakes to decide many of the constitutional questions left unresolved by *Shaw*, (J.S. App. 12). Those questions, as this Court implicitly anticipated in *Shaw*, are as far reaching as they are difficult. Unlike the narrow holding in *Shaw* itself, the district court decision in this case would render unconstitutional *per se* virtually every predominantly non-white district in the nation created to comply with section 2 or section 5 of the Voting Rights Act. Summary affirmance by this Court of the decision below would resolve the constitutional issues at stake, in a manner binding on all lower federal and state courts, without the briefing, argument and thorough consideration appropriate for matters of such exceptional importance.

The Department of Justice submitted an amicus brief in the district court. Because of the palpable impact of the decision below on enforcement of sections 2 and 5 of the Voting Rights Act, it might be useful to invite the Solicitor General to express the views of the United States regarding this appeal.

I. THE DECISION BELOW MISCONSTRUED THE PROHIBITION OF *SHAW V. RENO* TO APPLY TO *ANY* CONSIDERATION OF RACE IN REDISTRICTING

This Court's decision in *Shaw* was deliberately and repeatedly limited to a holding that a claim is stated by an allegation that a districting plan is so bizarre and irregular on its face that it could only be explained on the basis of race. The Court's opinion specifically emphasized that it was not deciding "whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged." 113 S.Ct. at 2828. The district court in the instant case addresses that very issue, erroneously insisting that *Shaw* itself had held that any consideration of race in creating predominantly nonwhite districts is, unless justified by a compelling state interest, unconstitutional.

The decision below repeatedly departs from the very deliberate limitations in *Shaw*. The *Shaw* opinion reiterates on no fewer than seven occasions that it concerns only districting plans so peculiar on their face that they could not rationally be explained in non-racial terms.[1]

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[1] 113 S.Ct. at 2824 ("legislation so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races"); 2826 ("plan . . . so irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race"); 2828 ("on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race"); 2829, 2830 ("plan, on its face, so highly irregular that it rationally could be understood only as an effort to segregate voters by race); 2829, 2830 ("plan . . . so irrational on its face that it

Shaw applied, not to every districting plan in which race might have been considered, but only to "those *'rare'* statutes that . . . are, on their face, unexplainable on grounds other than race." 113 S.Ct. at 2825 (Emphasis added). Inexplicably ignoring this limitation, the district court below insisted that *Shaw* actually applied to *all* districting plans in which race was considered in order to assist historically disadvantaged minorities:

> The bedrock principle underlying the Court's decision in *Shaw* is that racially gerrymandered plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.

(J.S. App. 13). As used by the district court "racial gerrymandering" refers to *any* creation of a predominantly non-white district that is "intentional, not . . . accidental." (J.S. App. 12). (Emphasis omitted).

Shaw specifically subjected to strict scrutiny only those "rare" cases facially explicable only on the basis of race. The court below insisted, on the other hand, that *Shaw* does not establish a distinct rule for such cases, but merely refers to such rare cases as one of several possible ways of proving the existence of any covert racial motive:

> *Shaw* primarily deals with the problem of proving racial gerrymandering *indirectly* or *inferentially*. Racial gerrymandering – says the Court in

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immediately offends principles of racial equality;" "plan rationally cannot be understood as anything other than an effort to segregate . . . on the basis of race); 2832 ("scheme so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race").

> *Shaw* – can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose. But[2] . . . [w]e need not even consider the kind of indirect or inferential proof in *Shaw* to reach the same point – a finding of racial gerrymandering.[3]

(Emphasis in original.)

Shaw recognized a distinct rule for districts explicable only on the basis of race because "reapportionment is one area in which appearances do matter." 113 S.Ct. at 2827. *Shaw* was founded on a concern that racial polarization might be induced by "a district *obviously* . . . created solely to effectuate the perceived common interests of one racial group." 113 S.Ct. at 2827 (Emphasis added). The district court in the instant case held, to the contrary, that what matters is not overt appearances but covert motive. Thus, it reasoned, testimony by legislators as to their personal, albeit hidden, motives would be more important than the mere appearance – racially neutral or otherwise – of the plan.

> [R]acial gerrymandering may – *a fortiori* – also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race. If everyone – or nearly everyone – involved in the design and passage of a redistricting plan asserts or concedes that the design of the plan was driven by race, then

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[2] J.S. App. 14-15.

[3] J.S. App. 39; see also J.S. App. 18 ("*Shaw* deals primarily with proving racial gerrymandering *inferentially*") (Emphasis added)

> racial gerrymandering may be found without resorting to the inferential approach approved by the court in *Shaw*.

(J.S. App. 15). (Emphasis in original). Because of its view that covert motive was the critical issue, the district court focused at length on testimony by individual legislators regarding their motives in adopting Act 42. (J.S. App. 40-41).

Shaw indicated that to prevail at trial a plaintiff must demonstrate that the challenged plan "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races." 113 S.Ct. at 2824. The district court, however, held that all a plaintiff ever need do is "allege" that a plan has such a characteristic. Once a complaint is filed with such an allegation, according to the court below, the *Shaw* issue drops from the case, and the complaint itself is somehow sufficient to create a *presumption* of unconstitutionality.

> After a citizen establishes a cause of action by *alleging* that the reapportionment scheme adopted by his state is so irrational on its face that it can only be understood as an effort to segregate voters on the basis of race – thereby creating a *presumption of unconstitutionality – the burden shifts* to the state. . . .

(J.S. App. 22).[4] (Emphasis added).

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[4] See also *id.* at 24-25:

"[T]he Plaintiffs have clearly *alleged* . . . that the Plan . . . is highly irregular. . . . It consequently devolved upon the Defendant either to *refute the*

Under *Shaw* itself a challenge can be defeated by evidence that the disputed plan could "rationally" be explained by considerations other than race. The district court held, on the other hand, that such rational explanations are irrelevant unless they are actual reasons for the districting scheme; thus a plan rationally explicable in non-racial terms may nonetheless be unconstitutional. At trial defendants-appellants demonstrated that the contours of disputed District 4 grouped into that district voters in particularly poor neighborhoods who were likely to share the special interests and problems of the indigent. The district court accepted that testimony as factually correct and then dismissed it as legally irrelevant:

> The Defendants offered this evidence to suggest "a rational basis [for District 4] other than race." We do not gainsay the conclusions of this witness, but we disagree that they have significance. . . . [A]ll these observations are irrelevant because we find . . . that the socioeconomic profiles of the Plan's districts were not actually used by the Legislature.

(J.S. App. 36-37). Other rational non-racial explanations for district 4 were also dismissed by the court below as "rationalizations." (J.S. App. 32, 37), i.e., as accounts which would indeed provide a rational non-racial explanation for the plan, but which were not the actual motive at work.

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allegations or to provide legitimate, non-racial explanations for the Plan's irrational shape. . . . "
(Emphasis added)

The divergence from *Shaw* is highlighted by the district court's finding that it would have been possible to create two relatively compact predominantly non-white districts. (J.S. App. 51-53). Since *both* the possible compact plans, and the less compact plan actually enacted, would have had two non-white districts, the choice *between* them could not have been due to a desire to "segregate voters on the basis of race." However, this factual finding, presumptively fatal to a *Shaw* claim, was in the district court's view sufficient to demonstrate that the districting plan was per se unconstitutional. (See part IV, infra).

Implicit in *Shaw's* unwillingness to apply strict scrutiny broadly to *any* consideration of race was an understanding that legislators in fact routinely consider race, ethnicity and religion in drawing district lines. Such criteria are often reliable predictors of electoral behavior, and thus a vital tool for legislators in seeking – as virtually all legislators do – to create districts that will favor particular candidates. A blanket application of strict scrutiny to such practices would, if enforceable, invalidate virtually every districting plan currently in force in the nation.

The district court avoided this dilemma by holding that strict scrutiny applies only to racial considerations that benefit historically disadvantaged minorities. The court thus distinguished district lines designed to create homogeneous Protestant, and Catholic districts, which it lauded as a "traditional" districting practice, from predominantly black districts, which it denounced as "segregated". District 4 was struck down, in part, because it led to the creation of mixed Catholic and Protestant districts. Under the headings "Commonality of Interests" and "Religion and Ethnicity", the district court objected:

> District 4 violates the traditional north-south ethno-religious division of the State. Along its circuitous route, this new district combines English-Scotch-Irish, mainline Protestants, traditional rural black Protestants, South Louisiana black Catholics, Continental French-Spanish-German Roman Catholics, sui generic Creoles, and thoroughly mixed polyglots, each from an historically discrete and distinctive region of Louisiana, as never before so extensively agglomerated.

(J.S. App. 31). In the view of the district court, a homogenous English-Scotch-Irish district would be a traditionally "distinctive region", while a predominantly black district would be "segregated"; blacks placed in a predominantly white district would be laudably "integrated", while Protestants in a predominantly Catholic district would be the victims of "non-traditional" "agglomeration". The district court's opinion concludes with a finding that the creation of District 4 was unconstitutional because it was "distruptive to the traditional . . . ethnic . . . and religious organization of the State." (J.S. App. 52).

The district court compounded this special status of ethnic and religious lines by carefully defining "racial gerrymandering" so that it is largely limited to efforts to assist historically disadvantaged minorities. " 'Racial gerrymandering' refers to the intentional . . . *segregation* of voters on the basis of race." (J.S. App. 12). (Emphasis omitted and added). In Louisiana, where 28% of registered voters are black, a districting plan which deliberately provided that every district was 28% black would not constitute segregation, or constitutionally suspect

"racial gerrymandering", even though such a plan would assure with near certainty that no candidate of choice of black voters would be elected. Similarly, deliberately adding black voters to assist a white Democratic incumbent would not constitute segregation, or "racial gerrymandering". As those terms were used by the district court, a mixed race district with a black majority is referred to as "segregated", while a mixed race district with a white majority is denoted "integrated". Thus, the intentional race-based creation of a 72% *black* district would be subject to strict scrutiny and, as we note in part III, infra, would be unconstitutional per se, while the deliberate creation of a 72% *white* district would avoid strict scrutiny entirely because voters would not be "segregated". Such a skewed interpretation of the Fourteenth Amendment cannot possibly be reconciled with this Court's decision in *Shaw*.

II. THE DECISION BELOW, PERMITTING A COLLATERAL ATTACK ON A DECISION OF THE ATTORNEY GENERAL DENYING PRECLEARANCE UNDER THE VOTING RIGHTS ACT, CONFLICTS WITH 42 U.S.C. § 1973c AND WITH *PERKINS V. MATTHEWS*, 400 U.S. 379 (1971) AND *MORRIS V. GRESETTE*, 432 U.S. 491 (1977)

The decision of the district court raises a question of great legal and practical importance regarding how and in what court section 5 determinations by the Attorney General may be reviewed.

The instant controversy has its roots in 1991 Louisiana legislation redistricting the state senate and redistricting the state Board of Elementary and Secondary

Education (BESE). Districting plans for the BESE Board have historically been based on the congressional district lines. Following the 1990 census, the legislature enacted a districting plan for BESE that contained only a single majority black district. The plan was submitted to the Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. The Attorney General issued an administrative determination disapproving this plan on the ground that it violated sections 2 and 5 of the Act. The state's submission of its Senate redistricting plan was also rejected because of its failure, in the Justice Department's view, to create additional majority black districts. Under section 5 Louisiana could have obtained a de novo determination of those issues by bringing suit against the United States for declaratory relief; section 5 explicitly provides, however, that such a suit to review a decision of the Attorney General may be filed only in the United States District Court for the District of Columbia. Louisiana chose to comply with the Attorney General's determination without further litigation. The state subsequently adopted a new districting plan for BESE that contained two majority black districts whose contours are largely the same as the congressional districts at issue in this case[5].

When in 1992 the Louisiana legislature turned to redrawing the congressional district lines, it knew from the Attorney General's prior determination regarding

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[5] The BESE plan contains eight districts. The congressional plan contains seven districts. Neither the parties nor the court below treated that difference as significant.

BESE that the Justice Department would disapprove a plan involving only a single majority black district.[6] Bowing to that prior administrative determination, the Louisiana legislature enacted Act 42, containing two majority black congressional districts.

When the validity of the congressional districting plan was challenged in the instant case, the state defended its action as necessary to comply with the prior 1991 administrative determination by the Attorney General. The district court responded by making its own evaluation of the same issues previously considered by the Attorney General. The court below held that the Attorney General's determination was mistaken, and thus could not afford a basis for the state's subsequent congressional districting scheme. The district court's opinion contains a lengthy and strongly worded disagreement with the decision of the Justice Department and with the letters setting forth that determination issued in 1991 by the Assistant Attorney General for Civil Rights. (J.S. App. 17-22 n. 21).

> [N]either Section 2 nor 5 of the Voting Rights Act justifies the A[ttorney] G[eneral]'s insistence upon two black districts. . . . Section 2 emphatically does not authorize the A[ttorney] G[eneral's] O[ffice] to reject plans that fail to "give full effect" to minority voters. . . . Neither can Section 5 of the Voting Rights Act – on the basis of the 1990 census – justify the A[ttorney]

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[6] "[T]he Attorney General's Office had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* 'safe black districts.' " (J.S. App. 18 n. 21). (Emphasis in original).

> G[eneral] O[ffice]'s insistence that Louisiana adopt a congressional districting plan with two safe, black majority districts.

The district court's disapproval of the Attorney General's 1991 determination was based in particular on that court's disagreement with the Attorney General's conclusion that the black community in northern and eastern Louisiana was sufficiently compact to be placed in a single district, a fact-specific determination of central importance under the Voting Rights Act. (J.S. App. 17-22 n. 21). The majority opinion below thus held that Louisiana could not rely on the Attorney General's 1991 administrative determination to defend the congressional district lines because, in that court's view, that administrative determination was wrong; the concurring opinion insisted that "reliance on possibly invalid applications of the Voting Rights Act by the Department of Justice" could not provide even "a rational basis" for the challenged districting. (J.S. App. 73).

The action of the lower court in reconsidering the Attorney General's 1991 determination was flatly inconsistent with the language and established interpretation of section 5 of the Voting Rights Act. Section 5 expressly provides that a preclearance determination by the Attorney General, while subject to judicial review, can be reconsidered by only one lower federal court – the District Court for the District of Columbia.

This Court has repeatedly held that *all* other lower federal courts lack jurisdiction to review such a determination.

> What is foreclosed to such district court[s] is what Congress expressly reserved for consideration by the District Court for the District of Columbia . . . – the determination whether a covered charge does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."

United States v. Board of Supervisors, 429 U.S. 642, 645 (1977); *Connor v. Waller*, 421 U.S. 656 (1975); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). This Court expressly upheld the constitutionality of that jurisdictional limitation in *South Carolina v. Katzenback*, 383 U.S. 301, 335 (1966). Except in the case of a suit in the District of Columbia District Court brought by the enacting jurisdiction, "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion." *Morris v. Gresette*, 432 U.S. 491, 567 n. 24 (1977).

The action of the court below in reviewing and disapproving the Attorney General's preclearance decision is flatly inconsistent with *Perkins*, *Morris* and *United States v. Board of Supervisors*. The congressional determination to limit review of the Attorney General's decision reflects a desire to assure an expeditious and final resolution of questions raised by preclearance. *Morris v. Gressette*, 432 U.S. at 503, 504 n. 19. Instead, Louisiana finds itself under judicial attack in 1994 because it obeyed in good faith a 1991 administrative determination which Congress intended would be conclusive.

The jurisdictional provisions of section 5 were also enacted to assure that judicial interpretations of section 5 were centralized in a single court uninfluenced by the local passions and interests that might color the judgment

of judges serving in a state subject to preclearance. If the decision of the district court in this regard is upheld, the Attorney General's section 5 administrative determinations would be subject to collateral attack before three-judge federal courts, individual federal judges, or even state judges anywhere in the nation. The possibility of such open-ended reconsideration of preclearance decisions is inconsistent with the language and purpose of section 5, and with the state's interest in the finality of section 5 determinations.

III. THE DECISION BELOW THAT PREDOMINANTLY NON-WHITE DISTRICTS MAY NOT CONSTITUTIONALLY EXCEED 55% NON-WHITE VOTERS WOULD INVALIDATE MOST PREDOMINANTLY NON-WHITE DISTRICTS IN THE UNITED STATES.

The court below, assuming arguendo that Louisiana had a compelling state interest in adopting Act 42, held that districting plan unconstitutional on the ground that District 4 had too many black voters. The majority reasoned that in order to be narrowly tailored a predominantly non-white district must contain no more than the absolute minimum number of non-white voters needed to accord blacks "a realistic chance to determine the outcome of elections there". (J.S. App. 48). The court concluded that District 4, with a 63% black voting age population, contained an unconstitutionally large number of black voters.

The district court thus held that the constitutional requirement of narrow tailoring places a cap on the number of black voters who may be permitted in any

single district. Of course in Louisiana, as throughout the nation, there are countless districts in which the *white* voting age population exceeds 65%;[7] but a plan according to *blacks* the same degree of control over a district, the court below held, would be unconstitutional.

> [T]his Plan . . . packs more voters into a district 4 than are reasonably necessary. . . . [W]e need only ask rhetorically "If 54% is sufficient in District 2, why must District 4 be supersaturated with 63% black voting age citizens?" . . . [A] district with a black voting age population of not more than 55% – and probably less – would have been adequate.[8]

(J.S. App. 48-49). Judge Walter's concurring opinion framed this conclusion in slightly different terms, holding that a state could do little more than create "evenly split districts". (J.S. App. 68 n. 4).

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[7] In Louisiana 71.39% of the voting age population is white. (J.S. App. 55). Regardless of whether Louisiana creates one or two predominantly black districts, it is virtually certain that *all* the remaining districts will be in excess of 65% white.

[8] The finding that District 2 had a voting age population of 54% is not supported by the evidence. The statistics introduced indicate that according to the 1990 data, the black voting age population for District 2 was 56% (Exhibit P-14). Further, the distinction that the court attempts to draw between Districts 2 and 4 is contradicted by the table included in Appendix A to the court's decision. That table shows that the Black voter registration, a more accurate indication of voting strength, for Districts 2 and 4 are 60.02% and 63.15%, respectively, hardly an indication that one district is "supersaturated" relative to the other.

The decision below, if upheld by this Court, would invalidate virtually every districting plan enacted to comply with section 2 of the Voting Rights Act. All of those plans are subject to strict scrutiny under the decision of the district court, and the vast majority involve districts that are more than 55% non-white. We set out on the opposite page the minority voting age population of the 43 congressional districts in which blacks and/or hispanics constitute a majority. Of these only three fall under the 55% ceiling established by the court below. Ironically, two of the three are the North Carolina congressional districts at issue in *Shaw v. Reno*.

The decision below would have bizarre and indefensible consequences for the redistricting process. Where a state undertook, pursuant to section 2 of the Voting Rights Act, to create a predominantly non-white district, the state would have to dismember any large non-white community to avoid exceeding the 55% ceiling. That would be a particularly common problem in drawing the boundaries of comparatively small legislative or local government districts. A state seeking to comply with section 2 would constitutionally be obligated to disregard traditional districting criteria – such as compactness, contiguity, or respecting political subdivisions – if applying those criteria would result in a district with more than the "necessary" number of black voters. Such a constitutional requirement surely stands *Shaw v. Reno* on its head.

BLACK AND HISPANIC VOTING AGE POPULATION 1992 CONGRESSIONAL DISTRICTS[9]

District Number		Black and Hispanic Voting Age Population
New York	15	98%
California	33	84%
New York	11	83%
California	35	81%
New York	10	78%
California	37	74%
Florida	21	74%
Illinois	2	72%
Illinois	1	71%
Michigan	15	71%
Florida	17	70%
Florida	18	70%
Texas	15	70%
New York	6	69%
Maryland	7	69%
New Jersey	10	68%
New York	12	67%
Virginia	2	67%
Michigan	14	66%
California	32	66%
Alabama	7	64%
Illinois	4	64%
Illinois	7	64%
Louisiana	4	63%
Texas	27	63%
Texas	28	63%

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[9] M. Barone and G. Ujifusa, *The Almanac of American Politics 1994*, pp. 23, 163, 165, 167, 169, 171, 174, 178, 283, 311, 313, 319, 323, 344, 357, 390, 392, 397, 405, 541, 545, 582, 589, 670, 674, 718, 829, 878, 889, 890, 893, 900, 946, 970, 1013, 1085, 1161, 1197, 1245, 1251, 1272, 1278, 1314.

District Number		Black and Hispanic Voting Age Population
Texas	30	63%
Texas	18	62%
Maryland	4	62%
Georgia	11	61%
California	30	60%
California	34	59%
Georgia	5	59%
Pennsylvania	2	59%
Mississippi	2	58%
South Carolina	6	58%
Louisiana	2	56%
Ohio	11	56%
California	31	55%
Florida	23	55%
Tennessee	9	55%
North Carolina	1	54%
North Carolina	12	54%
Florida	3	53%

IV. THE DECISION BELOW FORBIDDING CONSIDERATION OF TRADITIONAL DISTRICTING CRITERIA OTHER THAN COMPACTNESS IN CREATING PREDOMINANTLY NON-WHITE DISTRICTS CONFLICTS WITH *SHAW V. RENO*

The court below held as a matter of law that where the Equal Protection Clause *permits* the deliberate creation of majority non-white districts, equal protection *requires* that a state enact only the most compact possible configuration that achieves that goal. The district court reasoned that any district other than the most compact alternative would by definition not be "narrowly tailored", since a more compact alternative would exist. (J.S.

App. 49-53). The plaintiffs and defendants alike contended, and the court found, that in the instant case it would have been possible to create two majority black districts that were comparatively compact. (J.S. App. 51-52). The court below held that that possibility rendered District 4 unconstitutional per se.

Such a legal rule would be enormously disruptive of traditional districting considerations, as the circumstances of this case illustrate. The evidence in the instant case demonstrated that one such more compact plan was opposed by Republican incumbents. A second such more compact plan was opposed by Democrats because they feared it would have enabled Republicans to defeat a number of incumbent Democratic Representatives. In short, the decision to pick a *less* compact two majority-minority district plan instead of a *more* compact two majority-minority district plan was the result of traditional partisan considerations. The district court held such considerations to be constitutionally impermissible. If the decision below is upheld, Louisiana will be required to adopt a districting plan which disregards all traditional districting criteria other than compactness.

This aspect of the decision below is squarely inconsistent with the holding in *Shaw* that compactness is *not* "constitutionally required." 113 S.Ct. at 2827. It conflicts as well with *Gaffney v. Cummings*, 412 U.S. 735 (1973), in which this Court upheld allegedly "indecent" districts that "wiggle[d] and joggle[d]" boundary lines to ferret out or exclude pockets of each party's strength. 412 U.S.

at 752 n. 18. The district court decision is flatly inconsistent with the decisions of this Court permitting the states to draw district lines for the avowed purpose of protecting or avoiding conflicts between incumbents, a practice unconstitutional per se under the district court's decision. *White v. Weisner,* 412 U.S. 783 (1973); *Burns v. Richardson,* 384 U.S. 73, 89 n. 16 (1966).

The decision below now declares these previously approved districting practices to be invalid when they reduce the compactness of a district. Although the district court decision may nominally be limited to districting plans adopted in part to comply with sections 2 and 5 of the Voting Rights Act, virtually *all* districting decisions in Louisiana, across most of the south, and in many of the northern and western states would be affected, since section 2 has operative force in any state or city with a significant minority population.

V. THE DECISION BELOW UPHOLDING THE STANDING OF PLAINTIFFS IN THE ABSENCE OF ANY FINDINGS OR EVIDENCE THAT THEY WERE IN FACT INJURED BY LOUISIANA'S DISTRICTING PLAN CONFLICTS WITH *LUJAN V. DEFENDERS OF WILDLIFE,* ___ U.S. ___ 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)

In the proceedings below appellants expressly disputed the standing of plaintiffs-appellees to maintain this action (J.S. App. 7, 8). The requirements which a plaintiff must meet to demonstrate standing are well established: (1) a concrete and particularized injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) a likelihood that the proven injury will

be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1968); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

This Court's decision in *Shaw v. Reno* recognized that a plaintiff seeking to challenge certain extreme forms of race based districting might in a particular case suffer either of two types of "harms . . . cognizable under the Fourteenth Amendment." 113 S.Ct. at 2828. First, a plaintiff would be injured if a challenged districting plan prompted an elected official to represent only a racial group to which the plaintiff did not belong, "rather than [his] constituency as a whole." 113 S.Ct. at 2827. Second, a plaintiff would be injured if the challenged districting had the effect of "exacerbat[ing] . . . patterns of racial bloc" voting by a racial group of which the plaintiff was not a member. 113 S.Ct. at 2827. But under *Shaw*, as in any other case, a plaintiff must actually demonstrate the existence of such injuries in order to establish standing.

In *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), this Court made clear that, at least where standing was questioned, a plaintiff is required to demonstrate with probative evidence each of the circumstances necessary for standing:

> The party invoking federal jurisdiction bears the burden of establishing these elements. . . . Since they are not merely pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the

> manner and degree of *evidence* required at the successive stages of the litigation. . . . [T]hose facts. . . . must be "supported adequately by the *evidence* adduced at trial . . . ."

Lujan v. Defenders of Wildlife, 112 S.Ct. at 2136-2137 (Emphasis added).

In the instant case, however, the district court did not purport to determine whether the plaintiffs had met their burden to establish injury, causation, and likely benefit from the litigation. The fatal defect in the decision below is not that it made erroneous findings on these essential factual issues, but that it simply made no findings at all. The lower court held only that white citizens as well as black citizens may enforce the Equal Protection Clause. (J.S. App 7-8). But that principle does not excuse white plaintiffs from the burden imposed on black plaintiffs to establish that they have actually been injured by challenged conduct. Compare *Allen v. Wright,* 468 U.S. 737 (1984) (black plaintiffs lack standing to challenge tax benefits for racially discriminatory private schools). The failure of the district court to make the findings of fact essential for a determination of standing is rooted in the failure of the plaintiffs to adduce evidence on those issues.

The failure of the district court to address the factual issues critical to plaintiffs' standing was inconsistent with this Court's oft repeated admonition that the lower courts are not to address substantive constitutional issues where some other ground exists to resolve the litigation. In the instant case the court below issued a sweeping constitutional decision, calling into question the validity of most districting plans in the nation, without first determining

whether the facts demonstrated the existence of a case or controversy that is a precondition of federal jurisdiction.

CONCLUSION

For the above reasons, the Court should note probable jurisdiction.

Because the district court did not make the factual determinations necessary to ascertain whether the plaintiffs have standing, the Court may wish to summarily vacate the decision below and remand for the factual findings required by *Lujan v. Defenders of Wildlife*. Such a disposition may render unnecessary a decision by this Court regarding the far reaching substantive constitutional questions prematurely addressed by the district court.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RAY HAYS, ET AL. — CIVIL ACTION NO. 92-1522

versus

STATE OF LOUISIANA, ET AL.

MEMORANDUM RULING AND ORDER

(Filed Aug 27 1992)

The request for injunction is **Denied.** This court will not interfere with the 1992 congressional elections.

The constitutional claims of the plaintiffs, state and federal, are **Denied.**

The issues under the Voting Rights Act are taken under advisement. Supplemental briefs on the question of whether specifically, under the totality of the circumstances, the redistricting plan embodied in Act 42 of 1992 dilutes the voting strength of any group, white or black, within the seven congressional districts created by the Act, or any of them, in violation of the Voting Rights Act.

Briefs shall be filed by the close of business, September 28, 1992; the Attorney General of the United States is invited to file *amicus* brief.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 27th day of August, 1992

/s/ Jacques L. Wiener, Jr.
Jacques L. Wiener, Jr.
United States Circuit Judge

/s/ John M. Shaw
John M. Shaw
Chief United States District Judge

/s/ Donald E. Walter
Donald E. Walter
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

No. 92-CV-1522

RAY HAYES, ET AL.,

PLAINTIFFS,

VERSUS

STATE OF LOUISIANA, ET AL.,

DEFENDANTS.

(Filed Dec 28 1993)

Before WIENER, Circuit Judge, SHAW, Chief District Judge, and WALTER, District Judge.

MEMORANDUM OPINION

WIENER, Circuit Judge:

Plaintiffs Ray Hayes, et al. (Plaintiffs) challenge the congressional redistricting plan (the Plan) adopted by the Louisiana State Legislature (the Legislature) when, following the 1990 census, it enacted Act 42 of 1992 (Act 42).[1] In its present posture, this case considers the

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[1] A technical distinction can be drawn between the terms "apportionment" and "reapportionment," on the one hand, and "districting" and "redistricting" on the other:

constitutionality of the Plan, admittedly designed *inter alia* to increase the number of black representatives in Louisiana's congressional delegation from one out of eight to two out of seven. The Plaintiffs insist that the Plan accomplishes this result by employing impermissible racial gerrymandering to create a new majority-black voting district, thereby violating the Equal Protection Clause of the United States Constitution.

In simplest form, this case poses the question, "Does a state have the *right* to create a racial majority-minority congressional district by racial gerrymandering?" In simplest form, the answer – largely supplied by the United States Supreme Court's opinion in *Shaw v. Reno*[2], rendered during the pendency of this case – is "Yes, but only if the state does it *right*."

Finding that the Plan in general and Louisiana's Congressional District 4 in particular are products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest, we conclude that

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> *apportionment* and *reapportionment* involve the allocation [by Congress] of a finite number of representatives among a fixed number of pre-established areas. *Districting* and *redistricting* . . . refer to the process by which the lines separating legislative districts are drawn [by states].

See Major v. Treen, 574 F. Supp. 325, 328 (E.D. La. 1983) (quoting Backstrom et al., *Issues in Gerrymandering: An exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1121 n.1 (1978). For simplicity, however, we use both terms interchangeably.

[2] *Shall v. Reno*, 508 U.S. ___, 113 S. Ct. ___, 125 L. Ed. 511 (1993).

the Legislature did not "do it right." We hold, therefore, that Plaintiffs' right to equal protection as guaranteed by the U.S. Constitution is violated by the Plan. Consequently, we declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; enjoin the State of Louisiana from holding any future congressional elections based on the Plan; and, although we do not invalidate the 1992 congressional elections held thereunder, hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the Plan shall expire, *ipso facto*, at noon on the 3rd day of January, 1995,[3] such terms of office not to be extended or carried over into the next Congress in any manner whatsoever.

I.

STATEMENT OF THE CASE

The Plan comprises five majority-white districts (Districts 1, 3, 5, 6 & 7) and two majority-black districts (Districts 2 and 4).[4] District 2 has a minority voting age population of 56%, while District 4 has a minority voting age population of 63%. New District 2 covers essentially the same geographic area as did old District 2 in the previous plan: almost the entire population of Orleans Parish and roughly one-third of the population of Jefferson Parish. District 2 is not challenged in the instant lawsuit, nor elsewhere to our knowledge. Rather, District

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[3] *See* U.S. Const. amend. XX, § 1.

[4] *See* Table, Appendix A.

4, appearing for the first time in Act 42, is the primary focus of this constitutional challenge.

Shortly after the enactment of Act 42, the Plaintiff filed this suit seeking to have 1) the Plan declared unlawful, 2) the Defendants enjoined from using the Plan in the impending congressional elections, 3) the Legislature ordered to create a new plan that would not segregate state residents into voting districts on the basis of race, and 4) the Defendants preliminarily enjoined "from taking any action in preparation for the primary or general elections for the U.S. House of Representatives. . . . " In their complaint the Plaintiffs – who are black, white, and Asian residents of either District 4 or District 6 – allege that the Plan violates Section 3 of the Louisiana State Constitution, Section 2 of the Voting Rights Act, and the Fifth, Fourteenth and Fifteenth Amendments of the United States Constitution.

As required by the Voting Rights Act, the chief judge of the United States Court of Appeals for the fifth Judicial Circuit appointed the instant panel to hear this case. It was tried on August 26 and 27, 1992 (the Trial). At the conclusion of the Trial, we issued an interlocutory Memorandum Ruling and Order (the 1992 Order) in which we denied Plaintiffs' request for an injunction, allowed the 1992 Congressional elections to go forward under the Plan, refused to consider Plaintiffs' state and federal constitutional claims, and took Plaintiffs' Voting Rights Act claims under advisement. We also requested Post-Trial briefing on the question whether the Plan dilutes the voting strength of either blacks or whites in contravention of the Voting Rights Act.

Being aware of an essentially identical case originating in North Carolina – now known as *Shaw v. Reno* – which had progressed further than had the instant case, we held this one under submission until the results of *Shaw* became known. On June 29, 1993, the Supreme Court rendered its decision in *Shaw*, profoundly affecting this case and similar ones pending in other states. We requested the parties and invited amici curiae to file supplemental briefs, generally discussing the implications of *Shaw* and specifically addressing whether – in the terminology of *Shaw* – the Plan was "narrowly tailored to further a compelling government interest." In August 1993, we held two additional days of trial (the Evidentiary Hearing) to assist us in determining whether the Plan is in fact the product of racial gerrymandering, and, if so, whether it should nonetheless be sustained because it is narrowly tailored to further a compelling state interest.

II

PRELIMINARY LEGAL MATTERS

A. Standing

Early in this case Defendants suggested that the white Plaintiffs intrinsically lack standing to challenge the Plan. The Defendants evidently believe that only historically disadvantaged minorities have standing to attack state laws that segregate citizens on the basis of race. But that is not the case.

In *Shaw*, the Supreme Court reaffirmed the important principle "that equal protection analysis is not dependant on the race of those benefited or burdened by a particular

classification."[5] "The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: 'No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.' The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[6] White citizens thus clearly have standing to challenge redistricting plans under the Equal Protection clause of the Fourteenth Amendment, just as do black citizens, Hispanic citizens, Asian citizens, Native American citizens, and citizens of any other race. We reject out of hand the implication that, although all are equal under the law, "some . . . are more equal than others."[7]

B. Survival of Plaintiffs' Equal Protection Claim

The Defendants assert that the Plaintiffs' equal protection claim does not conform to the structure of the

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[5] *Id.* at 531 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (internal quotations omitted).

[6] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). Indeed, laws that entail overt racial classifications are subject to strict scrutiny, even when they burden or benefit different races equally. *See, e.g., Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). "[R]acial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers*, 113 L. Ed. 2d at 425.

[7] George Orwell, Animal Farm 123 (Penguin Books 1972) (1946).

argument approved by the Court in *Shaw* and, consequently, that the Plaintiffs fail to state an equal protection claim under *Shaw*. The Defendants also argue that our 1992 Order, in which we denied Plaintiffs' state and federal constitutional claims, effectively disposed of the Plaintiffs' Equal Protection Clause claim with finality; and that we therefore may only consider the Plaintiffs' claim that the Plan violates the Voting Rights Act. We disagree with both of these assertions.

Although *Shaw* had not yet been decided at the time the Plaintiffs initiated the instant suit, the allegations in the Plaintiffs' complaint are clearly sufficient to make out a cognizable claim of racial gerrymandering under *Shaw*. The narrow holding of *Shaw* is that a citizen states a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face, so bizarrely shaped and convoluted, "that it can only be understood as an effort to segregate voters into separate voting districts because of their race. . . . "[8] There is no question that the Plaintiffs make such allegations in their complaint.

For example, the Plaintiffs allege that "[t]he adoption of Act 42 . . . has resulted in the creation of at least two of seven districts which are devoid of any commonality of interest . . . geographical compactness, continguousness [sic], consistency with existing political, societal, governmental or economic districts or jurisdictional boundaries, other than the racial designation of the majority therein."

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[8] *Shaw*, 125 L. Ed. 2d at 536 (indicating that irregular shapes may imply impermissible racial gerrymandering). *See also id.* at 528-29.

Similarly, the plaintiffs allege that "Act 42 created two amorphous districts which embody a scheme for segregation of voters by race in order to meet a racial quota for representation of the State of Louisiana in the United States House of Representatives." And again, Plaintiffs allege that "[t]he defendants enacted and intend to implement Act 42 with the intent to create a Congressional Plan concentrating voters of a particular race in designated districts. . . . " We find that these statements clearly amount to allegations that the State of Louisiana "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race."[9] We conclude that the Plaintiffs have stated an Equal Protection Clause claim essentially identical to the claim alleged by the plaintiffs in *Shaw*.

Moreover, our 1992 Order, denying Plaintiffs' state and federal constitution claims, worked a temporary dismissal of Plaintiffs' equal protection claim, not a final one. It was clearly an interlocutory ruling.

In an order dated June 29, 1993 (1993 Order) we requested supplemental briefing to clarify the relevance of *Shaw* to the instant case and to appear at the Evidentiary Hearing to elucidate whether the Plan was "narrowly tailored to further a compelling government interest," as required by the Court in *Shaw*. Of necessity our 1993 Order modified our 1992 Order and reactivated the Plaintiffs' equal protection claim in light of *Shaw*. As such a resuscitation is specifically contemplated and authorized

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[9] *Shaw*, 125 L. Ed. 2d at 536.

by Rule 54(b) of the Federal Rules of Civil Procedure,[10] the Plaintiffs' equal protection claim persists and demands adjudication by this court.

III

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As the findings of fact and conclusions of law in this case are inextricably intertwined, we do not present them in separate sections. Such separate presentation would increase the length and redundancy of our discussion. Rather, our language will indicate whether we find a particular observation to be a finding of fact or a conclusion of law. To The the extent that a finding of fact is also a conclusion of law, we adopt it as both a finding of fact and a conclusion of law. To the extent that a conclusion of law is also a finding of fact, we also embrace it as both a conclusion of law and a finding of fact.

A. Racial Gerrymandering: General

Plaintiffs allege that the Plan is a product of racial gerrymandering. Consequently, as noted above, this case falls squarely within the ambit of *Shaw v. Reno*. In *Shaw*, the Court held that plaintiffs state a justiciable claim

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[10] Rule 54(b) of the Federal Rules of Civil Procedure reads in pertinent part: "[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims . . . "Fed. R. Civ. P. 54(b).

under the Equal Protection Clause by alleging that a redistricting scheme is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race. . . . [11] As *Shaw* was an appeal of the district court's dismissal of the plaintiffs' case for failure to state a claim, however, the Court did not have to resolve that claim; it had only to recognize it. Thus, the roadmap sketched by the Court – as helpful as it is – leaves some questions to be answered in cases such as this.

1. Racial Gerrymandering Defined

A legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race.[12] Thus, "racial gerrymandering" refers to the *intentional*, not the accidental, segregation of voters on the basis of race.[13]

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[11] *Shaw v. Reno*, 125 L. Ed. 2d. at 536.

[12] *See, e.g., Wright v. Rockefeller*, 376 U.S. 52, 66-67, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964) (in which the Court examined whether the plaintiffs had sustained their burden of proving "that the New York legislature was either motivated by racial considerations or in fact drew districts on racial lines"). *See also Shaw*, 125 L. Ed. 2d 511 (in which "racially gerrymandering" and "intentional segregation of voters into separate voting districts" are used interchangeably throughout).

[13] For example, if a legislature devises a redistricting plan that separates river districts from mountain districts, and more blacks happen to live along the rivers, and more whites happen to live in the mountains, then the plan is not a product of racial

2. Racially Gerrymandered Plans are Subject to Strict Scrutiny

The bedrock principle underlying the Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.[14] As such, racially gerrymandered plans violate the Equal Protection Clause of the Fourteenth Amendment unless they are narrowly tailored to further a compelling governmental interest.[15]

Such plans receive "careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."[16] This intense scrutiny is justified by

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gerrymandering, even though it entails some coincidental segregation. In short, *de facto* or accidental segregation in not constitutionally suspect, but state-sponsored intentional segregation is, irrespective of the legislature's underlying motives.

[14] *Shaw v. Reno*, 125 L. Ed. 2d 511; *accord City of Mobile v. Bolden*, 446 U.S. 55, 67, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (indicating that claims of racial discrimination in the reapportionment context are resolved in the same way as other claims of racial discrimination); *Washington v. Davis*, 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (referring to *Wright v. Rockefeller*, 376 U.S. at 58, and pointing out that every member of the Court believed that plaintiffs stated a claim by alleging that "boundaries were purposefully drawn on racial lines"). In its supplemental brief to this court, the United States (which entered this case as amicus curiae) agrees that racially gerrymandered redistricting plans must be strictly scrutinized.

[15] *See Shaw*, 125 L. Ed. 2d at 528.

[16] *Id.* at 527. Thus, even if benign or benevolent motives underlie a legislature's decision to racially gerrymander a

the grave danger that is posed to our constitutional order and national community when a state creates and administers law based on the race of its citizens.[17]

3. Racial Gerrymandering May be Proved Either Inferentially or Directly

We have already noted the narrow holding of *Shaw*: a plaintiff may state a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face "that it can only be understood as an effort to segregate voters into separate voting districts because of their race. . . . "[18] *Shaw* primarily deals with the problem of proving racial

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redistricting plan, that plan is still subject to strict judicial scrutiny. As discussed below, good motives may allow a plan to survive strict scrutiny, if they rise to the level of a compelling state interest, and if the plan is narrowly tailored to further such an interest. But such motives – however unspotted – do not automatically exempt the plan from what amounts to a presumption of unconstitutionality.

[17] In *Wright v. Rockefeller*, Justice Douglas discusses the dangers of racial gerrymandering. *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (Douglas, J., dissenting) ("When racial . . . lines are drawn by the State, the multiracial . . . communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race . . . rather than to political issues are generated; communities seek not the best representative but the best racial . . . partisan."). In *Shaw*, Justice O'Connor echoes these same concerns. *Shaw*, 125 L. Ed. 2d. at 529 (Redistricting plans that segregate citizens primarily on the basis of race bear "an uncomfortable resemblance to political apartheid.").

[18] *Shaw*, 125 L. Ed. 2d at 536; *see id.* at 528-29 (indicating that irregular shapes may reflect impermissible racial gerrymandering).

gerrymandering *indirectly* or *inferentially*. Racial gerrymandering – says the Court in *Shaw* – can be inferred when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose.

But racial gerrymandering may – *a fortiori* – also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race. If everyone – or nearly everyone – involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*.[19] The Court recognized in *Shaw* that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."[20] The same is equally true when virtually unanimous, essentially uncontroverted *direct* trial evidence establishes racial classification, as it did here. In this case, we find overwhelming evidence – both *indirect* and *direct* – that the Plan is a product of racial gerrymandering.

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[19] *See id.* at 528-29, 536 (regardless of how a racial gerrymander is created, it should receive strict scrutiny); *accord City of Mobile v. Bolden*, 446 U.S. 55, 67, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).

[20] 125 L. Ed. 2d at 525 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)).

4. Intent Distinguished from Motive

In a brief aside, we draw on the familiar crime of homicide as a didactic analogy to clarify the important distinction between *intent* and *motive* for purposes of this case. By definition, one who knowingly cocks, aims, and fires a loaded gun at another has the *intent* to kill or cause great bodily harm. That is the *purpose* for shooting. But the shooter may have any number of *motives* for intentionally shooting the victim: to eliminate a romantic rival; to collect insurance proceeds; to avenge some actual or perceived wrong; to repel aggression; to prevent the victim from perpetrating a crime or misdeed; and on and on. The applicable motive is the *goal* sought to be accomplished through the *intentional* killing of the victim.

We belabor the distinction between intent and motive because it provides a more recognizable way of looking at two separate aspects of this case: 1) the *intent* of the Legislature in creating the Plan on the basis of race (racial gerrymandering); 2) the *motives* of the Legislature or of individual or groups of legislators – whether compelling or not – for engaging in racial gerrymandering. Whatever the *motivations* of the Legislature or of the individual legislators who passed the Plan, the evidence overwhelmingly indicates that the *specific intent* of the Legislature – as an independent, collective organism – was indisputably to enact a plan that included two black and five white majority districts.

At the Evidentiary Hearing so much of the testimony purporting to discuss the intent of the Legislature, or those who sought to influence Louisiana's 1992 redistricting, confounded and confused *intent* or purpose with

motive or goal. More telling (and more candid) was the testimony at the Trial, a year earlier, concerning the *motive* for creating a second majority-black congressional district. That testimony differed markedly from its counterpart at the Evidentiary Hearing. In both proceedings the testimony on motive was considerably less uniform than was the virtually unanimous testimony regarding the Legislature's *intent* to create a second safe, black majority district. At least by implication, however, four immutable elements provided a common point of departure for all witnesses: 1) Louisiana had an unavoidable legal obligation to reapportion its congressional delegation; 2) reapportionment had to be in strict compliance with the constitutional imperative of one-person, one-vote, meaning that each of Louisiana's seven congressional districts had to contain roughly 603,000 residents; 3) given its failure to adopt a reapportionment plan in 1991, the Legislature would have to adopt a plan in its 1992 session that would be certain to receive immediate preclearance so that the congressional election, scheduled for the fall of that year, could be held; and 4) to obtain timely preclearance, i.e., voluntarily and not by court decree, any plan would have to include two safe, black majority districts.[21]

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[21] Even though the Legislature put itself under severe time constraints by failing to redistrict in 1991, the United States Department of Justice – not a party to this litigation – must be regarded as an active player in this case. As Louisiana is covered by Section 5 of the Voting Rights Act, the Legislature must either (1) have any proposed plan precleared by the Department of Justice, or (2) seek a judgment from the United States District Court for the District of Columbia declaring that the plan "does not have the purpose and will not have the effect of denying or

B. *Shaw v. Reno*: Inferential Proof of Racial Gerrymandering

Shaw deals primarily with proving racial gerrymandering *inferentially*. We proceed to examine the indirect or

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abridging the right to vote on account of race or color. . . ." Voting Rights Act of 1965, 42 U.S.C. § 1973(c). The testimony at the Trial and at the Evidentiary Hearing reflected overwhelmingly that the Attorney General's Office (AGO) had let it be known that preclearance would not be forthcoming for any plan that did not include at least *two* "safe" black districts out of seven. But neither Section 2, nor Section 5 of the Voting Rights Act justifies the AGO's insistence upon two black districts.

To challenge a redistricting plan under Section 2 successfully, plaintiffs who are members of a cognizable racial group must demonstrate that their group is *numerous* enough and *geographically compact* enough to be a majority in a district. *Growe v. Emison*, 507 U.S. ___, 113 S. Ct. ___, 122 L. Ed. 2d 388, 403 (1993) (extending the threshold requirements elaborated in *Thornburg v. Gingles*, 478 U.S. 30, 46-47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), to single member, as well as multimember, districts). Obviously, however, black voters in District 4 do not constitute a *geographically compact* body as required by *Gingles*. Neither would any district resembling District 4 be geographically compact. Consequently, the AGO cannot legitimately claim that Section 2 of the Voting Rights compels the creation of any redistricting plan that contains a tortured district like District 4. Unless a second geographically compact black majority district is possible, the State's failure to create one does not violates Section 2. *Growe*, 122 L. Ed. 2d at 404. This is not to say that Section 2 forbids the creation of such a plan; simply that Section 2 does not require it. *Voinovich v. Quilter*, 507 U.S. ___, 113 S. Ct. ___, 122 L. Ed. 2d 500, 513-14 (1993). Consequently, the AGO cannot rely on Section 2 of the Voting Rights Act to force a state to adopt a plan containing an additional majority-minority district with a geographically dispersed black majority.

circumstantial evidence of racial gerrymandering in the instant case.

Additionally, Section 2 of the Voting Rights Act expressly states that "[n]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Voting Rights Act of 1965, Section 2, 42 U.S.C. § 1973. Section 2 refuses to transform the individual right to vote into a group right to elect. Thus, Section 2 emphatically does not authorize the AGO to reject plans that fail to "give full effect" to minority voters, or otherwise to create a *de facto* requirement of proportional representation by rejecting all plans that fail to maximize the concentration of minority voters. The text of section 2 of the Voting Rights Act expressly declares that proportional representation is not required.

Neither can Section 5 of the Voting Rights Act – on the basis of the 1990 Census – justify the AGO's insistence that Louisiana adopt a congressional redistricting plan with two safe, black-majority districts. In *Beer v. United States*, the Supreme Court stated that "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976) (emphasis added); *accord Shaw*, 125 L. Ed. 2d at 533. In this case, however, a redistricting Plan for the State of Louisiana that provided for one black majority district would have satisfied the requirement of nonretrogression.

As a result of the 1990 Census, Louisiana lost a seat in the United States House of Representatives: previously it had eight seats, now it has seven. Thus, even if the Legislature had adopted a plan with a single black majority district, that plan would have satisfied the Section 5 nonretrogression principle: whereas before black majority districts comprised one-eighth of all districts, under a new plan with one black majority district, such districts would constitute one-seventh of all districts, an increase of nearly two percent. Thus, the Section 5 nonretrogression principle does not, on the instant facts, require

1. The Shifting Evidentiary Burden

The Court in *Shaw* apparently intended to establish an evidentiary "minuet" for racial gerrymandering cases

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Louisiana to adopt a redistricting plan with a second black-majority district. Any suggestion by the AGO to the contrary was incorrect.

In summary, neither Section 2 nor Section 5 of the Voting Rights Act justify the AGO's insistence that Louisiana adopt a plan with two safe, black majority districts. Yet members of the Legislature uniformly believed that they needed to create such a redistricting plan to secure preclearance. The letters sent by the Office of the Assistant Attorney General (AAGO) in response to redistricting plans for the Louisiana Senate and the Board of Elementary and Secondary Education (BESE) show how Louisiana legislators got this mistaken impression.

In these letters, the AAGO acknowledged that the plans "appear[ed] to have no retrogressive effect" and met "in large part . . . Section 5 preclearance requirements." Yet the AAGO refused to preclear the plans because – in its apparent judgment – they could have been drawn "in a manner that would more effectively provide to black voters an equal opportunity . . . to elect candidates of their choice," there a euphemism for black candidates. But, again, the Voting Rights Act does not require that a plan be drawn to maximize the efficacy of the black vote, and we perceive the AAGO's insistence upon such a result to be tantamount to an insistence upon proportional representation: an insistence that is expressly forbidden by Section 2 of the Voting Rights Act.

In one letter the AAGO went so far as to suggest *how* the plan should be drawn to secure early preclearance by combining "significant concentrations of black voters in northeastern Louisiana and in the parishes bordering the State of Mississippi, both along the river and the state's southern border." Here – in a nutshell – was a blueprint for the highly irregular district known as District 4: a district that runs

analogous to the one established by *McDonnell Douglas v. Green* and *Texas Department of Community Affairs v. Burdine*

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through the length and breadth of the State, a district that ignores traditional geographical and political boundaries, yet a district that the AAGO inappropriately hinted would have to be created if Louisiana was to secure preclearance. What was the authority for the AAGO's insistence? The answer presents itself: none.

When State authorities wrote back, explaining the historical, cultural, political, economic, and religious significance of the north-south divide in Louisiana, as a means of explaining and defending its proposed plan, the AAGO dismissed the explanation and concluded that lumping black voters together in a district "transcends the distinction between northern and southern parishes." What was the authority for this judgment: again, none! To reiterate, neither Section 2 nor Section 5 of the Voting Rights Act requires that geographically dispersed black voters be lumped together to maximize the efficacy of their vote. That is nothing more than an AAGO "gloss" on the Voting Rights Act – a gloss unapproved by Congress and unsanctioned by the courts.

The Department of Justice did not conclude that Louisiana's concern with preserving its historic parishes was pretextual; it *decided* that creating black districts trumped traditional redistricting criteria. What was the authority for this policy decision? Yet again, none! As the AAGO concluded that the State BESE plan was not retrogressive with respect to the black vote, it necessarily admitted that the plan had no discriminatory effect. *See Beer v. United States*, 47 L. Ed. 2d 629, 639. Thus, the AAGO could legally reject the plan only if it determined – and presumably for non-arbitrary reasons – that the plan reflected discriminatory motives. *Georgia v. United States*, 411 U.S. 526, 93 S. Ct. 1702, 36 L. Ed.2d 472 (1973). But the AAGO did not so conclude.

Rather, the AAGO arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies, rather than as a shield to prevent lamentable historical abuses. The Attorney General's Office has

in the Title VII context.[22] After a citizen establishes a cause of action by alleging that the reapportionment scheme adopted by his state is so irrational on its face that it can only be understood as an effort to segregate voters on the basis of race – thereby creating a presumption of unconstitutionality[23] – the burden shifts to the state to proffer a legitimate, non-racial explanation for the irrationally shaped districts in its plan.[24] If, per chance,

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no authority to withhold preclearance for reasons outside the ambit of the Voting Rights Act. Indeed, because any plan that entails more racial gerrymandering than is absolutely necessary to pass Voting Rights Act muster is potentially unconstitutional, *Shaw*, 125 L. Ed. 2d at 534, the AGO will risk encouraging unconstitutional conduct if it pressures states to gerrymander their districts to maximize the concentration of minority voters.

[22] *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The three-step McDonnell-Douglas-Burdine "minuet" structures the basic allocation of burdens and order of presentation of proof in the Title VII context. *Burdine*, 450 U.S. at 252-53. This minuet requires (1) the plaintiff to prove – by a preponderance of the evidence – a prima facie case of disparate treatment that contravenes Title VII of the Civil Rights Act of 1964, (2) the defendant to proffer a legitimate, nondiscriminatory reason for the employee's rejection, and (3) the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. *Id.* at 253. At the end of the day, however, the plaintiff has the burden of proving that a violation of Title VII occurred. *See St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S. Ct. ___, 125 L. Ed. 2d 407 (1993).

[23] *Shaw*, 125 L. Ed. 2d at 536; *See also id.* at 528-29 (indicating that irregular shapes may imply impermissible racial gerrymandering).

[24] *Id.*

the state should answer, generally denying gerrymandering, and move for summary judgment, the plaintiff presumably would need to support such a presumption with summary judgment evidence, e.g., affidavits and depositions demonstrating legislative intent, violation of redistricting principles, or the like. But if the state advances a legitimate, non-racial explanation for the plan's irregularity, then the factfinder must – as always – weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering.[25]

Although the Court in *Shaw* does not discuss the respective burdens borne by the parties in this shifting protocol, Supreme Court precedent clearly indicates that plaintiffs have the ultimate burden of proving – by a preponderance of the evidence – that the irregularity of

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[25] *See, e.g., Wright*, 376 U.S. 52 (in which the Court held that the plaintiffs had not "sustained their burden of proving that . . . [the plan] . . . segregates eligible voters by race and place of origin in violation of the Equal Protection and Due Process Clauses. . . . "); *accord Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971). To clarify this minuet further, if a plaintiff comes into court with a map bearing hideously contorted districts and evidence that the state legislature drew those districts on the basis of race, and if the plaintiff complains that those districts lack a non-racial explanation – i.e., cannot be explained or understood without hypothesizing racial gerrymandering – then the plaintiff has stated a prima facie case under *Shaw*. If the state then introduces evidence that tends to show that the legislature was actuated by other motives that can explain the bizarre contours of the districts without resorting to race, the state has created a competing inference. The factfinder must then decide, on the basis of all available evidence, who is right.

the challenged districts reflects racial gerrymandering.[26] Proof on the merits would likely focus on the pretext of the state's proffered non-discriminatory reasons. Nevertheless, placing the burden of proof on the plaintiffs reflects a basic tenet of equal protection analysis: there can be no violation of the Equal Protection Clause unless those who complain demonstrate that the state has engaged in purposeful discrimination.[27] Thus, in this case, Plaintiffs have the burden of demonstrating by a preponderance of the evidence that the Legislature was "motivated by racial considerations" when it adopted Act 42.[28] We find that the plaintiffs have met that burden – comfortably.

2. Plaintiffs' Cause of Action

In addition to stating a cause of action by alleging extreme irregularity of shape, a plaintiff may, under *Shaw*, strengthen the inference that the state engaged in constitutionally suspect racial gerrymandering by demonstrating the state's disregard of traditional districting principles.[29] As discussed above in section II B, the Plaintiffs have clearly alleged both that the Plan – particularly

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[26] *Id.*

[27] *City of Mobile v. Bolden*, 446 U.S. at 66, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980) (citing *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)); Plaintiffs also have the burden of proving the invalidity of a reapportionment plan under Section 2 of the Voting Rights Act. *Voinovich v. Quilter*, 507 U.S. ___, 113 S. Ct. ___, 122 L. Ed. 2d 500, 512 (1993).

[28] *Wright*, 376 U.S. at 55.

[29] *Shaw*, 125 L. Ed. 2d at 528.

District 4 – is highly irregular on its face, and that the Plan disregards traditional districting principles.[30] We therefore conclude that the Plaintiffs established a cause of action essentially identical to that alleged by the plaintiffs in *Shaw*. It consequently devolved upon the Defendants either to refute the allegations directly or to provide legitimate, non-racial explanations for the Plan's irrational shape and its disregard of traditional districting criteria.[31]

3. Defendants' Proffered Justifications

Apparently recognizing the impossibility of directly refuting high irregularity and violation of traditional districting criteria, the Defendants attempted to justify the Plan. During the entire Trial, not one witness ever suggested that the Legislature's *intent* in creating District 4

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[30] For example, Plaintiffs allege that "[t]he adoption of Act 42 . . . has resulted in the creation of at least two of seven districts which are devoid of any commonality of interest . . . geographical compactness, contiguousness [sic], consistency with existing political, societal, governmental or economic districts or jurisdictional boundaries, other than the racial designation of the majority therein." *See* discussion in section II B of this Memorandum Opinion for other examples of Plaintiffs' allegations.

[31] Recalling our pedagogic comparison with homicide, when the state attempts to convict a defendant of homicide using circumstantial evidence – essentially arguing that the facts are consistent with homicide, the defendant may attempt to show that the evidence is consistent with a far more innocent hypothesis: for example, an accident. The Defendants' opportunity to provide legitimate, non-racial explanations for the Plan's irrational shape is analogous.

. . was anything other than to create a second district with a super-majority of black voters by drawing its boundaries along racial lines. Indeed, most of the testimony of the Defendants' witnesses concerned how numerically large a black majority was needed to ensure the effectiveness of the Plan, which everyone conceded to be a product of racial gerrymandering.

At the Evidentiary Hearing, however, following as it did on the heels of the Supreme Court's decision in *Shaw*, the Defendants – with the benefit of hindsight – attempted to deny the racial gerrymandering that they so candidly proclaimed and avidly defended a year earlier at the Trial. Specifically, the Defendants now suggest that two non-racial factors played key roles in the creation of the Plan: partisan/incumbent politics and socioeconomic commonalities. As discussed in the following section, we find the Defendants' explanations wholly unconvincing and in many respects disingenuous.

4. Choosing Between the Competing Inferences

Because of the procedural posture of *Shaw*, the court did not have to go beyond reversing the district court's grant of the defendants' motion to dismiss. Following a full merits trial here, however, we are obliged to decide whether the Plaintiffs have carried their burden of proving – by a preponderance of the evidence – that the Plan's irregularity and its disregard of traditional redistricting principles reflect racial gerrymandering. As we find that the *only sensible* explanation for the Plan's extreme facial irregularity and its flagrant deviation from

traditional districting criteria is that the Legislature intentionally segregated voters into congressional districts based on their race, we conclude that the Plaintiffs have overwhelmingly satisfied their burden of proving racial gerrymandering.

a. Plaintiffs' Inferential Evidence

1. The Plan is Highly Irregular

The most cursory inspection of the districts established by the Act 42 reveals several of them to be irregular, and District 4 to be highly irregular.[32] Like the fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "z" across the state, as it cuts a swath through much of Louisiana.[33] It begins north of Shreveport – in the northwestern corner of Louisiana, just east of the Texas border and flush against the Arkansas border – and sweeps east along that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. The district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively

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[32] *See* Map, Appendix B.

[33] *Id.*

includes only predominantly black residential neighborhoods. Finally, at its southern extremity, the district extends yet another projection – this one westward towards Lafayette – adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the Legislature engaged in racial gerrymandering.[34]

2. The Plan Violates Traditional Redistricting Principles

In *Shaw*, the Court reiterates the notion that states are not constitutionally *required* to adhere to the traditional redistricting principles of compactness, contiguity, respect for established political subdivisions, and commonality of interests.[35] The Court also observes that a state's *adherence* to traditional districting criteria "may serve to defeat a claim that a district has been gerrymandered on racial lines."[36] Yet a state's *disregard* of such criteria, emphasizes the *Shaw* opinion, may be evidence of constitutionally-suspect racial gerrymandering.[37]

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[34] *See generally Shaw*, 125 L. Ed. 2d 511.

[35] *Shaw*, 125 L. Ed. 2d at 528-29 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752, n.18, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973)). The seminal case of *Major v. Treen* also discusses these traditional redistricting criteria and applies them to the Louisiana context. *Major v. Treen*, 524 F. Supp. 325 (E.D. La. 1983).

[36] *Id.* at 529 (citing *Kardner v. Daggett*, 462 U.S. 725, 755, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983).

[37] *Id.* at 528.

Indeed, the Court in *Shaw* refers to a situation "in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles . . . " as a circumstance in which racial gerrymandering can be easily inferred, precisely because the state ignored such principles.[38] As a state's decision to disregard traditional redistricting criteria is probative of constitutionally-suspect racial gerrymandering, we closely examine the Plan's adherence (or, more accurately, non-adherence) to those principles; and we find that, for the most part, the Plan cavalierly disregards them.

a. Compactness

District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles.[39] A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, as it winds along its erratic path, District 4 projects myriad diverticulae to encapsulate small sacs of otherwise widely dispersed black voters. No one could claim that District 4 is compact, at least not with a straight face.

b. Contiguity

District 4 was confected to satisfy the traditional districting criterion of contiguity, but only hypertechnically and thus cynically. When displayed on a map of the State, the district's boundaries seem several times

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[38] *Id.*

[39] *See* Map, Appendix B.

to narrow to a single point. This impression reflects reality, for at some places along its attenuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity.[40]

c. Respect For Political Subdivisions

As one witness explained at the Evidentiary Hearing, there is no more fundamental unit of societal organization in the history of Louisiana than the parish.[41] Whereas the previous congressional plan divided only seven of modern Louisiana's 64 parishes, scattering fractions of the same parish in more than one congressional district, Act 42 splits and scatters 28. District 4 is particularly aggressive in violating the boundaries of these traditional political and governmental units of the State: of the 28 parishes touched by District 4, only four whole parishes are included; but the district annexes only shards of 24 additional parishes, usually incorporating none but the predominantly black fragments of those shattered regions. Additionally, for the first time in Louisiana history, with the advent of Act 42 a districting plan violates the boundaries of nearly all major municipalities in the State. With the exception of Lake Charles, the Plan fragments all major municipalities into more than one congressional district, thereby destroying the common

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[40] In complementary fashion, District 6 maintains contiguity only by employing gossamer connections at several junctions.

[41] A parish is analogous to a county, but it has its roots in, and takes its name from, the ministrations of the Catholic Church in early Louisiana history.

representation historically enjoyed by residents of the same municipality.[42]

d. Commonality of Interests

Within its irregular boundaries, District 4 subsumes bits of every religious, ethnic, economic, social, and topographical type found in Louisiana.

(i) Religion and Ethnicity

District 4 violates the traditional north-south ethno-religious division of the State. Along its circuitous route, this new district combines English-Scotch-Irish, mainline Protestants, traditional rural black Protestants, South Louisiana black Catholics, Continental French-Spanish-German Roman Catholics, sui generic Creoles, and thoroughly mixed polyglots, each from an historically discrete and distinctive region of Louisiana, as never heretofore so extensively agglomerated.

(ii) Economic Base

Cotton and soybean plantations, centers of petrochemical production, urban manufacturing complexes, timberlands, saw mills and paper mills, river barge depots, and rice and sugarcane fields are strung

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[42] Disregarding New Orleans, which comprises the majority of District 2, the major municipalities of Shreveport, Baton Rouge, Lafayette, Monroe, Alexandria, and Ruston are all rent asunder in this manner.

together to form the eclectic and incoherent industrial base of District 4. These diverse segments of the State economy have little in common. Indeed, their interests more often conflict than harmonize.

(iii) Geography and Topography

Red clay hills and pinelands, hardwood bottomlands and forests, alluvial floodlands, coastal plains, marshes, swamps and wetlands – all are present in District 4, which – as noted above – stretches more than half a thousand miles from end to end. What did the Legislature intend when it created District 4 – this non-traditional, little-in-common "un-district"? The indirect evidence overwhelmingly indicates that the Legislature specifically intended to create a plan with at least two majority black districts. Given the pre-existence of District 2, we find beyond cavil that the Legislature accomplished this by parceling voters into the remaining six districts on the basis of race.

b. Defendants' Counter-Proof

In contrast, we have been shown no credible evidence supporting the defense witnesses' proffered motivations of party and incumbency protection and socioeconomic commonality. Their explanations ring hollow. We find them to be no more than disingenuous, *post hoc* rationalizations.

In particular, we find that neither partisan nor incumbency politics was a significant factor in the core decision intentionally to create a plan containing a second

black majority district. At the trial, the Defendants never suggested that partisan or incumbent politics played a role in the determination to create District 4.[43] Indeed, Defendants' counsel objected to Plaintiffs' counsel's questions aimed at eliciting testimony about the Black Caucus-Republican Caucus alliance that supported Act 42, arguing that such testimony was political and therefore irrelevant to the case. Moreover, even though party and incumbency protection play some role – large or small – in virtually everything done in the legislative branches (and executive branches, for that matter) of our contemporary governments, this universal truism does not negate the compelling inference that Act 42 in general, and District 4 in particular, are products of racial gerrymandering. Additionally, without for a moment granting that incumbency politics played a significant role in the decision to create a second majority black

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[43] At the Evidentiary Hearing, Defendants introduced evidence of the role of incumbency, but it proved irrelevant to the issue of intentional segregation of voters by race. Such evidence showed, at most, that incumbency affected only the general location of the gerrymander that is District 4, i.e., the effective efforts of Congressional incumbents in "pushing" the preordained second black majority district generally as far north and east as possible. Thus it follows largely the northern boundary of Louisiana with Arkansas and the eastern boundary of Louisiana, i.e., the Mississippi River. But, as Louisiana had already lost one of its eight seats in the House of Representatives, creating a game of incumbents' "musical chairs," none should be surprised by the interesting but irrelevant fact that, once the decision to create a second minority-majority district had been made, each incumbent did what he could to keep his traditional geographical base and see that the new district was located anywhere but in his.

district, we question whether the Defendants could prevail in this litigation even if it had.

The Defendants seem to believe that they can defeat a claim of racial gerrymandering under *Shaw* if *any* factor other than race played *any* cognizable role in the creation of a challenged redistricting plan. Although we need not correct such a misconstruction of *Shaw* to find racial gerrymandering in this case, we briefly address this legal issue – *obiter dictum* – in hopes of shedding a little additional light on this difficult area of the law.

The Defendants evidently base their belief – that the presence of any non-racial motivating factor will excuse racial gerrymandering – on language found at the end of the *Shaw* opinion. There the Court indicates that a plaintiff *states a claim* under the Equal Protection Clause by alleging that a reapportionment plan is so irrational on its face "that it can be understood *only* as an effort to segregate voters. . . . "[44] This emphatically does not mean that if any other factor influenced the legislature the plaintiff is unable to establish a racial gerrymander. Rather, it means that if the contours and content of a redistricting plan *can* be wholly explained to be the product of one or more factors other than race, then the defendants have created a competing inference. The court must then weigh the competing inferences – as indeed it usually must – to decide whether the plaintiff has proved his inference by a preponderance of the evidence.[45] Thus,

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[44] *Shaw*, 125 L. Ed. 2d at 536 (emphasis added).

[45] *Wright v. Rockefeller*, 376 U.S. 52, 57, 84 S. Ct. 603, 11 L. Ed. 2d (1964).

accurately stated, the question posed by *Shaw* is whether a redistricting plan can be reasonably conceived as the product of non-racial factors. In this case the Plan cannot.[46]

No one claims that the contours of District 4 can be wholly and alternately explained as a product of partisan or incumbency politics. Every single witness who addressed the issue either proclaimed or acknowledged that the creation of a second black majority district was

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[46] At the risk of flaying a dead horse, we point out that logic demands that the Defendants' reading of *Shaw* be rejected. Suppose a state legislature came right out and admitted that it racially gerrymandered districts in a reapportionment plan, thereby obviating the plaintiff's need to show racial gerrymandering inferentially. Could the state then say, "but we also drew a few district lines to protect incumbents, or to follow a river, or to put a state wildlife park in the district of a congressman who likes migratory birds," and thereby defeat plaintiff's claim because race *was not the only factor* involved in the delineation of districts? Race will never be literally the only factor. So *Shaw* requires only that race be an important factor. If the plaintiff's evidence shows that the plan cannot be understood without postulating that the legislature was significantly actuated by racial motives, then the plaintiff has made out a case of racial gerrymandering.

The cases of *Wright v. Rockefeller* and *Arlington Heights v. Metropolitan Hous. Dev. Corp.* support this interpretation. In *Wright* every member of the court accepted that the plaintiffs stated a claim by alleging that the "New York Legislature was *either motivated by racial considerations*, or in fact drew the districts on racial lines." 376 U.S. at 54. Similarly, the Court in *Arlington Heights* noted that invidious discriminatory intent need not be the legislature's dominant purpose: proof that such discriminatory intent was "a motivating factor" in the legislation is sufficient. 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

the primary factor – or at least a substantial and important factor – in the creation of the Plan. We agree. There is no way that a rational factfinder – looking at the map and reviewing the *credible* evidence with care – could conclude that Act 42 can be explained entirely without reference to racial gerrymandering.

At the Evidentiary Hearing, Dr. Alan Lichtman, an expert witness for the Defendants, opined that District 4 – which appears so violative of traditional redistricting principles – actually possesses socioeconomic commonality and coherence. Dr. Lichtman contended that District 4 was distinguishable from other districts because its residents were relatively poor, relatively under-educated, and owned fewer telephones and automobiles than did the residents of other districts established by the Plan. The Defendants offered this evidence to suggest "a rational basis [for District 4] other than race."[47] We do not gainsay the conclusions of this witness, but we disagree that they have significance.

Any able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district. In this case District 4 was found to be fairly poor, although poverty is not particularly distinctive in any region of Louisiana. Had District 4 been a fairly wealthy district, the Defendants' expert

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[47] The Defendants also offered this evidence to argue (1) that Act 42 served a compelling state interest by enhancing the representation for poor people – especially poor black people – and (2) that the Plan adhered to the traditional redistricting principle of "commonality of interests" and thus was narrowly tailored.

could have opined that the citizens of District 4 shared the common interest of wealth. And had District 4 fallen right in the middle, he could have explained that District 4 was distinctive in being the most solidly middle class. But all these observations are irrelevant because we find them to rise to no level higher than *post hoc* rationalization.[48]

The Defendants admit that the socioeconomic profiles of the Plan's districts were not *actually* used by the Legislature: the census data used in Defendants' statistical analyses were not even available to the Legislature

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[48] An additional criticism of Mr. Lichtman's statistical legerdemain is that the socioeconomic characteristics he analyzes are themselves strongly correlated with race, a classic chicken-or-egg fallacy. At this moment in history black people in the South (and generally in America) are – on the average – poorer and less well-educated than their white counterparts. Moreover, blacks in largely segregated communities are probably poorer – on the average – than blacks in more integrated communities. Consequently, racially gerrymandered plans, which seek to draw boundaries around various concentrations of black persons, will inevitably tend to concentrate the poorer, less well-educated blacks.

The Defendants' conclusions therefore have a tautological quality: to prove that factors other than race can explain District 4, the Defendants analyze socioeconomic factors that correlate strongly with race. Of course District 4 is relatively poor and relatively uneducated: it was intentionally filled with relatively poor and uneducated minorities. To use statistical parlance, Dr. Lichtman's conclusions are *spurious:* they tell us nothing that we could not have predicted based on the Legislature's decision to pack District 4 with black voters. For a more scientific discussion of such *spurious correlations,* see Hubert M. Blalock, Jr., *Social Statistics* 443-48 (McGraw-Hill 1972).

when it passed Act 42. More specifically, freshman Louisiana State Senator Tom Greene testified that no socioeconomic data was submitted with the various redistricting plans when they were considered by the Legislature. Thus, the allegedly distinctive socioeconomic profile of District 4 is factually unconvincing, methodologically flawed, irrelevant, and unquestionably a hindsight rationalization of a plan that everyone understands to have been principally designed to create two majority-black districts. More simply, the socioeconomic profile of District 4 is an *effect* of District 4's design, not a *cause*.

We see, then, that the Defendants' proffer of protection of incumbent politicians and distinctive socioeconomic profiles as alternative explanations for the peculiar contours of the Plan simply do not ring true. Faced with competing inferences, this court – as fact finder – must determine the credibility of witnesses, weigh the evidence, and choose between those inferences.[49] Concluding that the facts and inferences overwhelmingly favor the Plaintiffs, we find that the Plan is undeniably a child of racial gerrymandering.[50] Defendants must therefore demonstrate that Act 42 is narrowly

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[49] *Wright v. Rockefeller*, 376 U.S. 52, 57, 84 S. Ct. 603, 11 L. Ed. 2d (1964).

[50] In finding that racial gerrymandering exists in this case, we feel confident that we are faithfully following the Supreme Court's temper in *Shaw*. In that case, the Court gives two examples of fact patterns in which proving racial gerrymandering "will not be difficult at all." *Shaw*, 125 L. Ed. 2d at 528. One example is when "a State concentrate[s] a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect

tailored to satisfy a compelling state interest, as required by *Shaw* and other applicable Equal Protection Clause cases.[51]

C. Direct Proof of Racial Gerrymandering

We need not even consider the kind of indirect or inferential proof approbated in *Shaw* to reach the same point – a finding of racial gerrymandering. In this case, we also reach that junction when we consider the great weight of the *direct* evidence elicited at both the Trial and the Evidentiary Hearing.[52] Regardless of whether we reach a finding of racial gerrymandering by the inferential approach elaborated in *Shaw*, or by direct testimony and documentary evidence, the Defendants have the burden of justifying that gerrymandering.

In this case, direct evidence clearly and forcefully demonstrates that the Plan is a product of racial gerrymandering. Virtually every witness who testified at the Trial (all without the benefit of a retrospective, self-serving view of *Shaw*) either affirmatively stated or accepted

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for subdivisions." *Id.* Those facts squarely conform to this case. In the instant case, the Louisiana State Legislature created a serpentine belt 600 miles long to engulf enough blacks (actually, more than enough) to create a single super-majority district. According to the Court, this case presents a textbook example of racial gerrymandering that can be easily proved by application of the *Shaw* inferential minuet.

[51] *Shaw*, 125 L. Ed. 2d at 528; *see also supra* note 13.

[52] *See Shaw*, 125 L. Ed. 2d at 528 (implying that however a racial gerrymander is established, it should receive strict scrutiny). *See also supra* note 17 and accompanying text.

as gospel that the Plan was drawn with the *specific intent* of ensuring the creation of a second, safe, black majority congressional district: namely, District 4. The Defendants' witnesses either stated or conceded that the districts created by Act 42 were racially gerrymandered. Indeed, those witnesses, both lay and expert, spent most of their time at the Trial discussing how large the percentage of registered black voters needed to be in the new majority black district to guarantee the efficacy of their racial gerrymander – an efficacy they viewed as the *sine qua non* of preclearance.

In response to this court's query whether the Legislature had created a racial gerrymander, Defendants' counsel – Mr. Mongrue – said, "[a]nd [racial gerrymandering]'s exactly what [the Legislature] can do. . . . " Similarly, Mr. Willie Hunter, a black state legislator and a fact witness for the Defendants, testified that the Legislature's *intention* "was to create a district where there was an excellent possibility of having another black elected . . . , and that to accomplish this they [the legislators] "looked at numbers [of black voters] period." Professor Engstrom, an expert witness for the defense, stated unabashedly that "race drove . . . [the creation of] . . . the Districts."

Not surprisingly, the Plaintiffs' witnesses were at least equally convinced that considerations of race motivated the creation of Act 42. State Representative Adley, a white legislator from Northwest Louisiana, testified that "the only issue presented to us was a racial issue" and stated that District 4 was created "for the sole purpose of making sure that an additional black district got created regardless of what it looked like and what parishes it ran

through . . . " Dr. Gary Stokley agreed that "this plan is [based on] race."

At the more recent Evidentiary Hearing, however, the Defendants attempted to recast their arguments in light of *Shaw* and to gainsay the racial gerrymandering that they so readily approbated during the pre-*Shaw* Trial. But even at this latter hearing the witnesses agreed that race was the overarching factor that drove the actual creation of the Plan, and that the Legislature had specifically intended to assort voters into districts based on race. Senator Marc Morial, a black legislator from New Orleans who appeared on behalf of the Defendants, testified that "[i]t was the intent of the Legislature to create . . . [a] . . . second majority black district." This is perhaps the clearest, most direct post-*Shaw* statement of intent, and the best illustration of the difference between *intent* and *motive*. Similarly, United States Congressman James A. Hayes (D. La) stated that the politics of race "was the major element" that drove the creation of the Fourth District. Dr. Lawrence N. Powell, one of Defendants' expert witnesses, agreed that "the primary determinant" of the shapes of Districts 2 and 4 was race.

During four full days of testimony, two in 1992 and two more in 1993, some witnesses stated that race was the only factor, while others said that race was the primary factor. One witness – apparently uncomfortable with saying race was the primary factor – admitted that race was a very important factor. Not one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering – not one.

Harking back to our homicide analogy, we note that although witnesses at the Evidentiary Hearing voiced various altruistic *motives* – or accused others of various ulterior *motives* – for intentionally employing racial gerrymandering to create voting districts on the basis of race,[53] everyone agreed that the *intent* of the Legislature – analyzed as a whole rather than from the point of view of its constituent members or caucuses – was to create a redistricting plan with a second majority black district.

The evidence showed that the Plan passed the Legislature by virtue of an uncommon alliance of legislators: Some who supported the Plan wanted a second supermajority black district to increase the number of black representatives in Louisiana's congressional delegation. Other supporters of the Plan perceived various benefits in the correlative whitening of some districts that attends the intentional segregation of black voters into other adjacent districts.[54] But there is absolutely no doubt that the immediate *intent* of the Legislature as a whole was to enact a plan containing two black majority districts, essentially without regard to any other considerations and interests.

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[53] Among the positive goals thus voiced were promoting racial harmony, increasing racial fairness, eradicating vestiges of past de jure segregation, and "obeying the law" in the sense of complying with the Voting Rights Act in a way that would justify preclearance, to name a few.

[54] Testimony at the trial revealed that Act 42 was passed by a legislative alliance between the Black and the Republican Caucuses, historically uncommon bedfellows but, according to expert testimony, a phenomenon occurring with increasing frequency across the country.

Viewed in any light, the direct evidence in this case proves the presence of racial gerrymandering. Thus, even in the event that we may have somehow misconstrued the Court's opinion in *Shaw*, or misapplied the inferential minuet established therein, the *direct evidence* that Act 42 was a product of racial gerrymandering is overwhelming. Two independent evidentiary bases (inferential and direct) thus support our finding that Act 42 reflects racial gerrymandering. Each is sufficient on its own to subject Act 42 to strict scrutiny, and each is consequently sufficient to require the Defendants to demonstrate that Act 42 is "narrowly tailored to further a compelling governmental interest," as required by *Shaw* and other applicable Equal Protection Clause precedents.[55]

D. Strict Scrutiny of the Plan

Again, the core principle underlying the Supreme Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race.[56] To survive such scrutiny, racially gerrymandered redistricting plans must be narrowly tailored to further a compelling governmental interest.[57]

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[55] *Shaw*, 125 L. Ed. 2d at 528.

[56] *See supra* note 13.

[57] *Shaw*, 125 L. Ed. 2d at 528.

1. Compelling Governmental Interest

Defendants advance four possible compelling state interests to justify their racial gerrymandering: (1) conformity with Section 2 of the Voting Rights Act, (2) conformity with Section 5 of the Voting Rights Act, (3) proportional representation of Louisiana blacks in Congress,[58] and (4) remedying the effects of past racial discrimination. Witnesses also made oblique references to various other admirable but nebulous – and often question-begging – motives, like promoting racial harmony and ensuring fairness. As we conclude, however, that Act 42 is not narrowly tailored to further these or any other compelling state interests, we need not decide here whether any one or more of them – properly clarified – is such an interest. For the sake of judicial economy, then, we do not analyze them in detail. Rather, we assume –

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[58] At the Trial, Legislator Willie Hunter strongly advocated a second black majority district for the expressed goal of achieving black proportionality in congress. Without commenting – one way or another – on proportional representation's viability as a "compelling governmental interest," we foresee serious constitutional problems in accomplishing that goal through creation of a second black majority district. Evidence adduced here demonstrates that, of Louisiana black voting age population outside New Orleans, even the overloaded 63% black District 4 would produce the election of the [black] candidate of choice of fewer than 40% of those blacks whom the proponents of proportional representation want to be thus represented in Congress. Consequently, the Plan would constitute state action that, in effect, grants voting "proxies" *from* the black voters residing in Districts 1, 3, 5, 6 and 7 *to* the black voters of District 4 – clearly a disenfranchisement implicating equal protection and possibly due process as well.

without granting – that one or all of them constitutes a compelling state interest.

2. Narrowly Tailored

By thus assuming – again, without granting – that the Defendants have articulated one or more compelling state interests that the Plan might further, we have shifted the focus of our strict scrutiny to the final aspect of *Shaw:* whether the Plan is narrowly tailored. In our final illustrative comparison with homicide, we note the parallelism between the hypothetical criminal defendant's burden – *at common law* – of establishing an affirmative defense – such as justifiable homicide – and the State's burden here of establishing the affirmative justification of a compelling state interest.[59] But even such affirmative

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[59] We realize that many states choose to make the absence of justification an element of the *actus reus,* thereby imposing upon the prosecution the burden of proving that the criminal defendant did *not* act in self-defense. As the Supreme Court has lately declined to review whether the Due Process Clause requires the burden of persuasion in self-defense cases to be placed on the prosecution, *see, e.g., Moran v. Ohio,* 469 U.S. 948, 105 S. Ct. 350, 83 L. Ed. 2d 285 (1984) (Brennan, J., dissenting), state legislatures remain free to allocate burdens of proof "by labeling as affirmative defenses" aspects of a case that could alternatively be considered elements of a crime. *Patterson v. New York,* 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); *see also McElroy v. Holloway,* 451 U.S. 1028, 101 S. Ct. 3019, 69 L. Ed. 2d 398, 399-400 (Rehnquist, J., dissenting). For our purposes, however, such subtleties are irrelevant: as noted above, we are merely using classic common law homicide/self-defense as an instructive analogy.

defenses contain crucial limiting elements: the requirement of applying only reasonable force in the self-defense context, and the requirement of narrow tailoring in the compelling state interest context.

A homicide defendant, relying for acquittal on self-defense or justifiable homicide, must show not only that he had a reasonable fear of imminent harm from the aggressor/victim, but also that he used no more force than was reasonably necessary under the circumstances. If a single, deterrent gunshot to the aggressor/victim's leg happens to cause death from uncontrollable hemorrhaging, the homicide may well be justified; but if the defendant fires two or three or four additional, immediately-fatal shots into vital areas of that same aggressor/victim's body after he has been neutralized by the first shot in the leg, the defendant is likely to find that the affirmative defense is unavailing.

In close parallel, *Shaw* tells us that, even in retrogression cases under Section 5, the State does not have carte blanche to engage in racial gerrymandering; its reapportionment plan must *not* go "beyond what [is] reasonably necessary" to further the compelling governmental interest.[60] That is the essence of narrow tailoring in the redistricting context: just as a homicide defendant may not use excessive force to stop an aggressor, neither may a state burden the rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the state.

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[60] Shaw, 125 L. Ed. 2d at 534.

In this case, uncontroverted evidence from both the Trial and the Evidentiary Hearing convinces us that the Plan is not narrowly tailored to satisfy any of the supposedly compelling state interests advanced by the Defendants.[61] We reach that conclusion first because the Plan entails considerably more segregation than is necessary to satisfy the need for a second black majority district – even assuming arguendo that such a second district were itself justified – and second because the Plan excessively burdens a variety of third party interests – dramatically so.

In its *Shaw* opinion, the Supreme Court provides one example to illustrate how to apply the requirement that a racially gerrymandered plan be *narrowly tailored* to satisfy one or more compelling state interests: "A reapportionment plan would not be narrowly tailored to avoiding the goal of retrogression if the state went beyond what was reasonably necessary to avoid retrogression."[62] Thus, if providing a single majority-minority district satisfies the nonretrogression requirement imposed by Section 5 of the Voting Rights Act,[63] then a racially gerrymandered redistricting plan comprising more than one minority-majority district is not narrowly tailored to satisfy the compelling

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[61] As noted above, in this section we assume – arguendo – that the State has demonstrated a compelling state interest, although, in fact, we have not so found. Neither could we on the evidence here presented. That is a judgment for the Legislature to make and the courts to review.

[62] *Shaw*, 125 L. Ed. 2d at 534.

[63] *Beer v. United States*, 425 U.S. 130, 141 (interpreting Section 5 as prohibiting voting-procedure changes that "lead to a retrogression in the position of racial minorities. . . . ").

state interest of comporting with Section 5.[64] Stated more broadly, as voters have an equal protection right not to be segregated by their state legislatures or local governments into various voting districts on the basis of race, only a plan that segregates to no greater extent than is reasonably necessary to further a compelling governmental interest can survive constitutional scrutiny. The same can be said for a plan that supersaturates a majority-minority district, while concomitantly depleting adjacent majority-majority districts of minority voters.

In this case, we find that the Plan entails more constitutionally suspect segregation than necessary, and is therefore not narrowly tailored. Continuing to assume arguendo that some state interest had been identified which could justify the creation of a second black-majority district, this Plan would have to be rejected as insufficiently narrowly tailored. It packs more black voters into a District 4 than are reasonably necessary to give blacks a realistic chance to determine the outcome of elections there, providing that they exercise their right to vote. Also, the boundaries of the district violate traditional

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[64] The Court's example clearly indicates that the State of Louisiana may not justify the Plan, or any other racially gerrymandered plan with more than one black majority district, by reference to the need to comply with the Section 5 nonretrogression principle. As noted above, because Louisiana lost a seat in the United States House of Representatives, a plan with one black majority district would satisfy the Section 5 nonretrogression requirement given no more dramatic shift in the statewide ratio of white-to-black voters than is demonstrated by a comparison of the 1980 and 1990 census figures. *See supra* note 21.

districting principles to a substantially greater extent than is reasonably necessary.

District 4 contains 63% registered black voters, significantly more than are needed to elect representatives of their choice. To greater or lesser degrees, all expert witnesses acknowledged – some only reluctantly under cross examination – that 63% black voting age population was well in excess of the percentage needed for reasonable comfort in creating a safe voting-age majority-minority district. For further confirmation that this is so we need only ask rhetorically "If 54% is sufficient in District 2, why must District 4 be supersaturated with 63% black voting age citizens?" No evidence was adduced by the Defendants to demonstrate a substantial difference between the voting patterns in the areas covered respectively by Districts 2 and 4 – either in white crossover or black block voting – to rationalize the 54%-63% disparity in black voting age populations.

Although the witnesses at trial disagreed on the exact percentage of net white cross-over votes for black candidates, we find that the evidence supported an average, *net* white cross-over vote in non-judicial elections of between 10% and 25%.[65] The evidence at trial also indicated that minority voter registration is now comparable

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[65] In other words, on the average – for non-judicial elections in Louisiana – black candidates will gain more votes from white cross-over voters (whites voting for black candidates) than they will lose from black cross-over voters (blacks voting for white candidates): thus, there is a positive *net* white cross-over vote. To put it another way, black voters are – again on the average – more racially coherent/conscious than white voters.

to white registration. Clearly, District 4 need not contain a black voting age population of 63% to satisfy the interest of a second district in which black officials can be readily elected. And, although it is not the province of this court in this case to establish the demographic specifications of the State's congressional redistricting plan, we find on the basis of the credible testimony and documentary evidence, that in this instance a district with a black voting age population of not more than 55% – and probably less – would have been adequate to ensure that blacks could elect a candidate of their choice, assuming they chose to exercise their franchise and assuming the candidate of their choice had more than a modicum of appeal for non-black voters.

Additional confirmation that the Plan is not narrowly tailored lies in its excessive disregard of traditional redistricting criteria and its derogation from third-party interests. Supreme Court precedent indicates that a variety of factors, both relative and absolute, are germane to analyzing whether a government measure is narrowly tailored. These factors include (1) the necessity of the measure, (2) the efficacy of alternative race-neutral measures, (3) the availability of more narrowly tailored (less intrusive) measures, (4) the flexibility and duration of the measure, and (5) *the impact of the measure on the rights of third parties.*[66] Relevant Supreme Court jurisprudence

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[66] See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510-511, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); *United States v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 510-15, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

thus suggests that – in essence – a plan is not narrowly tailored if it adversely affects more interests, if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest. We find that the Plan thus offends.

Whether under a relative or a comparative analysis, the evidence adduced at Trial and at the Evidentiary Hearing undeniably established that, even in the face of the black population's wide dispersion in Louisiana (outside New Orleans), a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles. For example, Marc Morial stated that "[t]here were alternatives which would have created a more compact black district that were not enacted. . . . " Similarly, Congressman Hayes admitted that a more compact plan could have been enacted. Freshman United States Congressman Cleo Fields – the former state senator and incumbent congressman from new District 4, who testified for the Defendants – also acknowledged that "it would have been possible to fulfill the desire of a second [black] majority district . . . and pay more attention than this District [District 4] does to both compactness and contiguity."

Dr. Alan Lichtman – one of the Defendants' expert witnesses at the Evidentiary Hearing – likewise testified that, were he to sit down with Dr. Ronald Weber (the expert on the other side) they "could create a [second black majority] district that looked better than this one [district 4]." And Dr. Weber – the Plaintiffs' expert witness at both the trial and the evidentiary hearing – testified that a plan could be devised that would include a second black majority district, yet still be significantly

more compact and comport much more closely with other traditional redistricting principles

The testimony of freshman state Senator Tom Greene at the Evidentiary Hearing was perhaps the most enlightening on this point. He stated that, with the neutral assistance of the Legislature's redistricting computer technician, he (Greene) actually created a plan that evinced greater respect for Louisiana's traditional parish boundaries than the Plan, and still included a second majority-black district. Finally, Mr. Glenn Koepp, who is the Assistant Secretary of the Senate and the technician in charge of reapportionment activity in Louisiana since 1981, testified that computer-supported mathematical modeling programs gave the State the tools to create several plans – including several with a second black district – that would respect traditional redistricting criteria to a much greater degree than does the Plan. Thus, the great weight of the credible evidence indicates that the Legislature could have developed and adopted a redistricting plan – even one with a second majority black district – that reflected greater respect for traditional redistricting criteria and that was less disruptive to the traditional political, social, economic, ethnic, geographical, and religious organization of the State. In short, substantially less extreme racially gerrymandered plans are readily available; plans without such obviously overbroad, overarching overkill.

In summary, we hold that the Plan is *not* narrowly tailored, either relatively or absolutely. This is so because it embraces considerably more racial gerrymandering – and thus more segregation – than is needed to satisfy any

advanced state interest, and because the Plan unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests. These several and varied interests – some constitutionally protected and others merely important – may not be callously sacrificed on the altar of political expediency, particularly when less broadly tailored plans are conceivable.[67]

IV

CONCLUSION

We find that the Plan in general and Louisiana's Congressional District 4 in particular are the products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest. We are therefore constrained to conclude that the Plaintiffs' right

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[67] We offer no opinion as to how much more narrowly tailored a plan would have to be to survive strict scrutiny. Indeed, we cannot say whether it is even possible – based on the 1990 Census – to devise a plan that would have two majority-minority districts and still be narrowly tailored *vel non*.

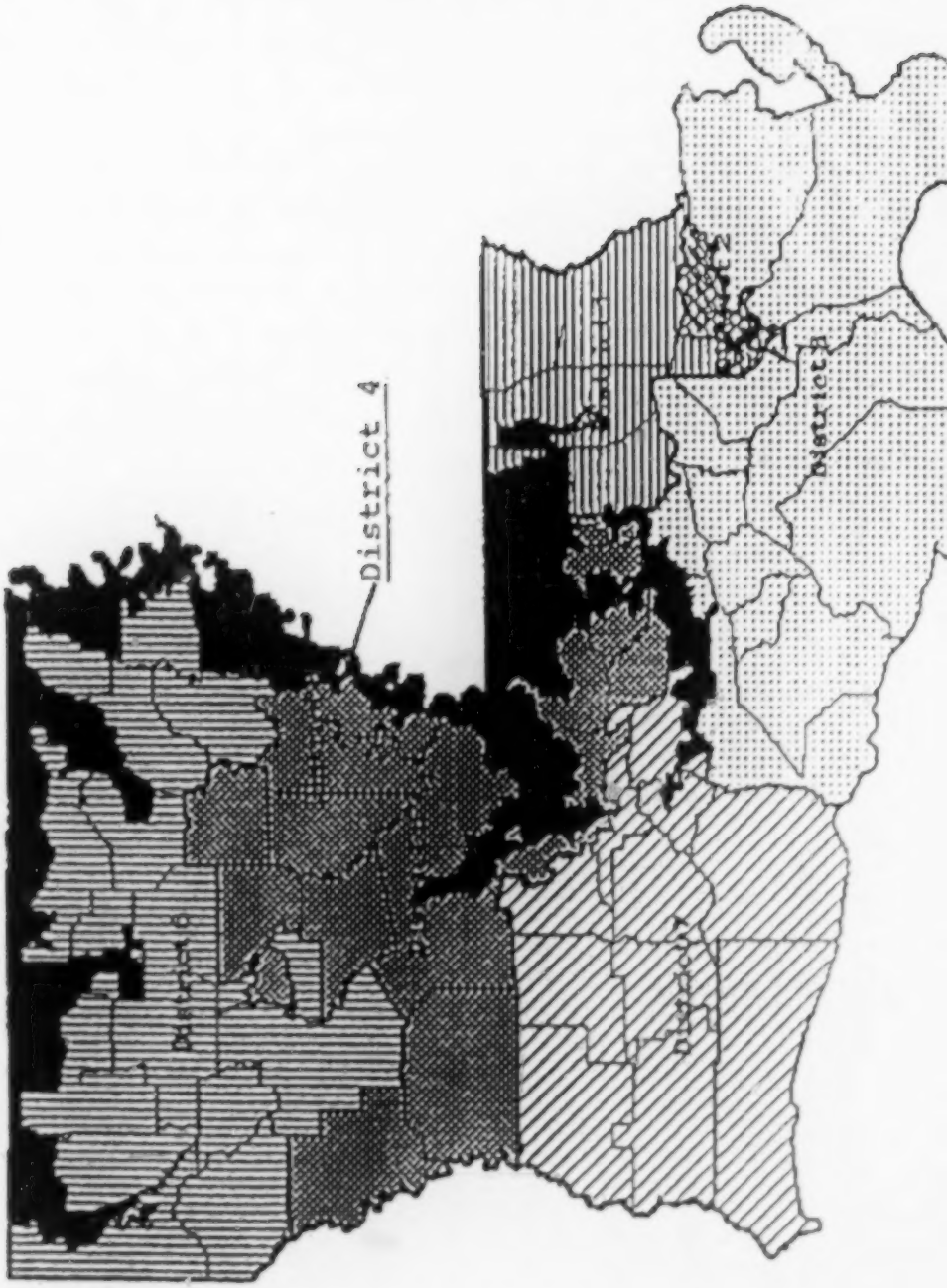
Even a plan that under the circumstances is as narrowly tailored as possible – in a *relative sense* (i.e., the least invasive and damaging plan available to further a compelling state interest) – may fail to be sufficiently narrowly tailored – on an *absolute* basis – to pass constitutional muster. For example, when the minority population is spread so evenly throughout a state that a majority-minority district cannot be drawn without dramatically impairing the constitutional rights of the citizens of that state, there may simply be no constitutionally permissible way to draw such a district, no matter how defensible the legislature's motives for wishing to do so, or how *bona fide* its efforts to tailor the plan narrowly.

to equal protection as guaranteed by the United States Constitution is violated by the Plan. Consequently, we declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; and we enjoin the State of Louisiana from holding any future congressional elections based on the Plan. We do not, however, invalidate the 1992 congressional elections held thereunder; but we do hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the Plan – and each district thus created – shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, such terms of office and such districts not to be extended or carried over into the next Congress in any manner whatsoever.

APPENDIX A
The Seven Districts Created by Act 42

District	Total Pop.	Total White	Total Black	Total Reg. Vot.	Total Reg. Wh.	Total Reg. Blk.
District 1	602,859	528,079	60,895	325,140	296,356	26,238
	100.00%	87.60%	10.10%	100.00%	91.15%	8.07%
District 2	602,689	213,832	367,460	295,953	113,917	177,634
	100.00%	35.48%	60.97%	100.00%	38.49%	60.02%
District 3	602,950	454,235	131,735	329,451	256,990	70,016
	100.00%	75.34%	21.85%	100.00%	78.01%	21.25%
District 4	602,884	198,389	400,493	309,357	112,241	195,351
	100.00%	32.91%	66.43%	100.00%	36.28%	63.15%
District 5	602,816	463,168	133,329	321,508	259,986	59,748
	100.00%	76.83%	22.12%	100.00%	80.86%	18.58%
District 6	602,854	502,982	87,718	329,071	289,575	38,032
	100.00%	83.43%	14.55%	100.00%	88.00%	11.56%
District 7	602,921	478,453	117,651	331,814	271,798	58,944
	100.00%	79.36%	19.51%	100.00%	81.91%	17.76%
Total	4,219,973	2,839,138	1,299,281	2,242,294	1,600,863	625,963
	100.00%	67.28%	30.79%	100.00%	71.39%	27.92%

APPENDIX B



(Filed Dec. 28, 1993)

Walter, District Judge, concurring:

I concur with the result of the majority opinion. However, since my examination of the case differs somewhat analytically, I write separately.

This court considered several questions: May a State enact a race-based reapportionment plan? If so, under what circumstances are race-conscious measures allowed? Finally, how do these requirements apply to Act 42.

I

LAW

> [I]n view of the constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved . . .
>
> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law . . .
>
> The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and

> state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race.

Plessy v. Ferguson, 163 U.S. 537, 558, 16 S.Ct. 1138, 1146 (1896) (Harlan, dissenting).

A

CONSIDERATION OF RACE IN REDISTRICTING LEGISLATION

Despite the legislation enacted to promote racial equality, many states remained recalcitrant to the Civil War amendments' mandates. Among the methods used by the states to evade the fifteenth amendment were poll taxes, literacy tests, and gerrymandered[1] districts. Responding to this perversion, Congress enacted the Voting Rights Act of 1965 "as a dramatic and severe response to the situation." *Shaw v. Reno*, – U.S. –, 113 S.Ct. 2816, 2823 (1993). Amended in 1982, section 2 of the Voting Rights Act prohibits the dilution of a minority group's voting strength while section 5 mandates pre-clearance of newly created districts for those states that employed disenfranchising schemes in the past. The purpose of the voting rights legislation is to prohibit State efforts to

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[1] Gerrymander is "[a] name given to the process of dividing state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines." Black's Law Dictionary (5th Ed.)

abridge or deny minority representation. To this end, when pre-clearance is sought under section 5, the Department of Justice usually seeks maximization of minority voting strength to promote minority representation.[2] Since legislators are thus obligated to consider racial factors when redistricting, a delicate balance arises between promotion of minority suffrage and the color-blind strictures of equal protection.

B

EQUAL PROTECTION

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14 §1. Interpreting this clause nearly a century ago, the Supreme Court held in *Plessy v. Ferguson*, 163 U.S. 537, 558, 16 S.Ct. 1138, 1146 (1896) that the separate but equal doctrine comported fully with the Fourteenth Amendment. *Id.* at 548. "The majority [in *Plessy*] held that persons could be legally classified and treated in such a manner because of their race when the classifying law was a reasonable exercise of the police power. This meant that such laws must be reasonable, good faith attempts to

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[2] It is my opinion that *Shaw v. Reno* did not fully address the constitutional or statutory authority behind Department of Justice pre-clearance requirements that arguably go beyond the Voting Rights Act. Thus, the Supreme Court may very well hold the Department of Justice's reliance on minimum "safe" percentages unconstitutional. I do not reach that question today but am troubled by the effect that these demands are having upon states seeking administrative pre-clearance rather than a declaratory judgment from the District Court of the District of Columbia.

promote the public good and not be designed to oppress a particular class." John E. Nowak, Ronald D. Rotunda, *Constitutional Law*, 618 (1991). As the Court itself stated:

> [W]e think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.

Plessy, 163 U.S. at 548, 16 S.Ct. at 1142.

Fifty-eight years later, *Plessy's* flawed concept of equal protection was rejected. Although *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686 (1954) did not expressly overrule *Plessy* outside the realm of education, that case heralded the demise of separate but equal treatment of the races by the states. Over the past four decades, the Supreme Court has confronted the consideration of race in State and federal legislation and has fashioned specific guidelines for testing the constitutionality of such considerations.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 113 S.Ct. at 2824. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility." *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 493, 109 S.Ct. 706, 722 (1989). Accordingly, the Court has "held that the Fourteenth Amendment requires

state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw,* 113 S.Ct at 2825. This test is known as strict or heightened scrutiny and is justified because:

> [a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 492, 109 S.Ct. at 721. These equal protection principles apply to statutes that "although race-neutral, are, on their face, 'unexplainable on grounds other than race,' " and classifications that are ostensibly neutral but are an obvious pretext for racial discrimination. *Shaw,* 113 S.Ct at 2825 (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977); *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)).

Under current equal protection doctrine, "race-conscious state decisionmaking is [not] impermissible in ***all***

circumstances." *Shaw,* 113 S.Ct at 2824 (emphasis in original). If State legislation contains explicit racial classifications, if it is inexplicable on grounds other than race, or if it contains race-neutral classifications that serve as mere pretext for racial discrimination, then courts are bound to apply the strict scrutiny regime. The classification must be ***justified*** by a ***compelling*** state interest, and then be ***narrowly tailored*** to fit that interest in order to survive constitutional scrutiny.

C

RACIAL GERRYMANDERING UNDER EQUAL PROTECTION

Redistricting legislation is almost always race-neutral on its face. Before *Shaw,* the Supreme Court had

> held that only two types of state voting practices could give rise to a constitutional claim. The first involves direct and outright deprivation of the right to vote, for example by means of a poll tax or literacy test . . . The second type of unconstitutional practice is that which affects the political strength of various groups in violation of the Equal Protection Clause. As for this latter category, [the Court] insisted that members of the political or racial group demonstrate that the challenged action have the intent and effect of unduly diminishing their influence on the political process.

Shaw, 113 S.Ct at 2834 (White, J. dissenting). The latter category, known as "dilution," arises when voters are not deprived of the right to vote, but, through methods such as "cracking," "stacking," and "packing," certain groups

are denied an *effective* vote. *See, United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) ("UJO"); *Voinovich v. Quilter*, 507 U.S. ___, 113 S.Ct. 1149, 122 L.Ed2d 500 (1993). Acknowledging UJO and its progeny, *Shaw* went further, holding that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Id.* at 2926.

Supporting this holding is the now famous case of *Gomillion v. Lightfoot*, 346 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) in which the Alabama legislature redefined the boundaries of Tuskegee, essentially excluding all but a few black citizens from the district. The result was "a strangely irregular twenty-eight-sided figure." *Id.*, at 341. The Court found the scheme repugnant to the Fifteenth Amendment, holding:

> . . . Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remain uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purpose to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters . . .
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens.

Id. at 341, 342. Therefore, racial gerrymandering, or legislation that manipulates district lines to achieve a predetermined racial result is subject to strict scrutiny.

D

PROVING A RACIAL GERRYMANDER

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563. Such invidious discriminatory intent or purpose need not be the legislature's dominant or primary consideration. Rather, proof that invidious discriminatory purpose was a motivating factor in the legislation will suffice. *Id.* Because improper racial classifications rarely appear on the face of legislation, the Supreme Court has identified subjects of proper inquiry in determining whether racially discriminatory intent existed. For example, legislation that "bears more heavily on one race than another" may indicate discrimination, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976), as will historical patterns, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 564 (1977), legislative history, *Id.*, irrationality pointing to nothing but racial classification, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886), and direct evidence adduced, as in this case, before a three judge panel. *Shaw* stands for the proposition that bizarre reapportionment schemes such as that challenged in North Carolina and Act 42 fall into the *Yick Wo* category and may, in and of themselves, be evidence of invidious discrimination.

Of course, these indicators may be rebutted by evidence of wholly legitimate purposes. "The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw,* 113 S.Ct. at 2826. When such legitimate purposes are disclosed and ***accepted by the court,*** heightened scrutiny is inappropriate. However, if the grounds asserted are an obvious pretext for racial discrimination or are simply *post hoc* arguments contrived to shield the segregation from judicial inquiry, the court must pursue the strict scrutiny regime.

E

STRICT SCRUTINY: WHEN IS A STATE INTEREST COMPELLING AND WHAT DETERMINES NARROW TAILORING?

1

COMPELLING STATE INTEREST

Few interests will be deemed "compelling" enough to justify State classifications according to race. The Supreme Court has given little indication as to what satisfied this portion of the strict scrutiny regime. However, the Court has accepted the correction of past governmental and private sector discrimination, *Richmond v. J.A. Croson,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed. 854 (1989), ethnic and racial diversification in the faculty and student bodies of state operated universities and professional schools, *see Regents of the University of California v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and has suggested that States have a "very strong interest in complying with federal antidiscrimination laws that

are constitutionally valid as interpreted and applied." *Shaw*, 113 S.Ct. at 2930. Despite the language in *Bakke*, the Court seems unwilling to allow any race-based measures outside a remedial setting[3]. *Croson*, 488 U.S. at 493, 109 S.Ct. at 721.

Although the States and their subdivisions may take action to remedy discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 488 U.S. at 503, 109 S.Ct. at 727. That identification occurs when "judicial, legislative, or administrative findings of constitutional or statutory violations" are made. *Bakke*, 438 U.S. at 308-309, 98 S.Ct. at 2757-2758. Otherwise, "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Croson*, 488 U.S. at 504, 109 S.Ct. at 728.

2

NARROWLY TAILORED

Once an interest has been properly identified and accepted as compelling, the court must examine the classification in order to determine whether it is narrowly tailored to "fit" the interest involved. In deciding whether race-conscious remedies are appropriate, the court may consider several factors. Among these are the

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[3] Compliance with federal law under the Voting Rights Act may be viewed as remedial and, therefore a state interest and perhaps compelling.

necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; and the impact of the relief on the rights of third parties. *U.S. v. Paradise,* 480 U.S. 149, 169, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987). However, the relief must not go beyond what is reasonably necessary to accomplish the compelling interests. *See, Shaw,* 113 S.Ct. at 2831.

Therefore, this court must first determine how the districts were drawn, that is, whether they were drawn along race lines or not. To do so, this Court will examine the factors listed in section D above. If the State counters with a legitimate non-racial explanation for Act 42's configuration, this Court will defer to the Legislature and refrain from reviewing the merits of their decisions. However, if a motivating factor behind the reapportionment scheme was racial, strict scrutiny applies. Then we turn to whether the State had a compelling interest supporting racial discrimination. We will expect the State to provide specific evidence warranting its action and require a nexus between the action and the interest. Finally, we will examine whether Act 42 itself was narrowly tailored to fit the compelling interest in light of the factors discussed above.

II

ANALYSIS

A

ACT 42 IS A RACIAL GERRYMANDER

This court found the evidence to indicate overwhelmingly that the intent of legislature was to divide

Louisiana's congressional districts along racial lines. The inferential evidence and the direct testimony of legislators for both the plaintiffs and the State allow no other conclusion. It is true that the State attempted to demonstrate non-racial explanations for the highly irregular districts. In light of the testimony at both the trial and evidentiary hearing, these suggestions are but *post hoc* rationalizations.

The evidence before the Court demonstrated that the State Legislature acted as it did to gain pre-clearance and contrived the interest of correcting past discrimination for the purpose of the evidentiary hearing alone. Finally, as the majority notes above, most witnesses readily admitted to the availability of other plans less offensive to traditional districting patterns and or smaller racial discrepancies.

B

ACT 42 IS SUBJECT TO STRICT SCRUTINY

As our factual findings denote, Act 42 is a clear example of a racial gerrymander. Specifically, District 4 permits no conclusion other than classic segregation. Both the facial irregularity without plausible non-racial explanation[4] and

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[4] The defense elicited testimony that District 4 actually represents certain commonalities of interest. Essentially, the State suggested that certain interests are predominantly shared by Blacks and therefore District 4 has a sufficient non-racial justification. This is exactly the type State action that our color-blind Constitution prohibits. As the *Shaw* Court held:

> "A reapportionment plan that includes in one district individuals who belong to the same race, but who are

the explicit testimony of the legislators require this finding. Since redistricting along racial lines was a *motivating factor*, Act 42 is subject to strict scrutiny. This panel must now determine whether Act 42 was justified by a compelling governmental interest and that the means chosen by the State to effectuate its purpose were narrowly tailored to the achievement of that goal.

> otherwise widely separated by geographical and political boundaries, and who may have little in common but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
>
> The message that such districting sends to elected representatives is equally pernicious. When a district is obviously created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Id.* at 2827.

I agree with what I perceive to be Justice O'Connor's views. If a multi-cultural State in which voters shared interests not according to the color of their skin but the content of their lives and experiences was the Legislature's goal, the tampering would have resulted in more evenly split districts. The races would then have to reconcile their differences with one another and move forward on common ground.

1

COMPELLING INTERESTS

The State advanced two main compelling interests behind the racial gerrymander. I discussed the findings required by *Croson*, *Wygant*, and *Bakke* when a State attempts to rely on prior discrimination as a foundation for remedial action. I see no reason why the same analysis should not apply when a state argues that compliance with federal anti-discrimination law mandated the jurisdiction's race-based action. In order to rely on "remedying past discrimination" and "obeying the law," a State must "demonstrate a strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 510, 109 S.Ct. at 730. I examine each purported interest in turn to see if the State has met this burden.

a

Past or Present Discrimination

"Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. 276, 106 S.Ct. 1848. The Supreme Court has firmly held that States must have "convincing evidence that remedial action is *warranted*." *Id.* While there is no doubt that Louisiana has a sorry history of race relations, the defense did not provide evidence that the Legislature had before it the necessary factual predicate warranting a voluntary affirmative action redistricting plan. In fact, the evidence supports the conclusion that the Legislature did not create Act 42 for the purpose of remedying past discrimination at all. Thus, if the State

does intend to redistrict along racial lines with the goal of correcting past electoral discrimination, it must demonstrate what evidence warrants a finding of discrimination and how a specific plan relates to the elimination thereof.

b

Pre-clearance from the Department of Justice

The State legislators acted under the assumption that failure to create a second majority-minority district would result in the denial of pre-clearance by the Department of Justice This assumption seems to be founded upon the rejection of two non-congressional plans by the Department of Justice. However, both letters from the Civil Rights Division acknowledged that the plans satisfied Section 5 pre-clearance requirements but rejected the plans because they could have been drawn more effectively. The *Shaw* opinion held that a state interest in complying with federal law is compelling only as constitutionally interpreted and applied. Additionally, by pointing out the distinction between what the law *requires* and what it *permits,* the Court stated that even valid plans under the Voting Rights Act must comport with the Fourteenth Amendment. Because the Voting Rights requirements do not give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression. the question for this court is whether the State of Louisiana had a strong basis in evidence for the belief that failure to create a second majority-minority district would violate Section 2 or 5 of the Voting Rights Act.

(1)

Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 was enacted to accomplish the guarantees of the Fifteenth Amendment. Specifically, Section 2(a) prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." This section therefore rejects State actions that, "interacting with social and historical conditions, impair the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, – U.S. –, 113 S.Ct 1149, 1155 (1993). If, under the totality of the circumstances, a State's apportionment scheme has the effect of diminishing or abridging the voting strength of a protected class, a Section 2 violation has occurred. *Id.* These "dilution" claims involve three threshold conditions.

> First, they must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single member district.' Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'

Id. at 1157 (quoting *Gingles*, 507 U.S. 30, 50-51, 106 S.Ct 2752, 2766, 92 L.Ed.2d 25 (1986). District 4 is evidence alone that the minority population large enough to constitute a majority in a single member district is not geographically compact. Without satisfaction of this initial

Gingles condition, it is impossible to find that the State had a rational basis to believe that failure to create a second majority-minority district would violate Section 2. Reliance on possibly invalid applications of the Voting Rights Act by the Department of Justice cannot create a compelling state interest. If so, the Department of Justice and various States could sidestep the holdings of *Croson*, *Gingles*, and *Shaw* with ease.

(2)

Section 5 of the Voting Rights Act

Similar findings are required under the "non-retrogression" analysis of Section 5. If the State had no basis to believe that one majority-minority district out of seven districts would constitute retrogression, then reliance on Section 5 as a compelling interest is misplaced. "Under [the nonretrogression] principle, a proposed voting change cannot be pre-cleared if it will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Shaw*, 113 S.Ct at 2830 (quoting *Beer v. U.S.*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). On its face, creating one district out of seven when the previous ratio was one district out of eight is not retrogressive. Once again, the legislature appears to have founded their belief that one district out of seven is retrogressive completely on the Department of Justice's previous unrelated rulings and the assumption that a gerrymandered second district was a requisite to preclearance. Without restating the points made above, I find

such an assumption, without additional evidence, uncompelling.

In summary, I find *post hoc* reliance on past discrimination and warrantless assertions that the Voting Rights Act mandated a second district, unpersuasive. This is not to say that the State cannot rely on those interests to justify future affirmative action. Rather, I find that the basis forwarded by the State to claim these interests as compelling is so slim that they reek of the pretextual and the contrived.

2

NARROWLY TAILORED

Even if this panel were to overlook the dearth of *Croson*-type findings in this case, Act 42 cannot be termed narrowly tailored to fit the interests above. Since I concur in the majority opinion, I find no reason to reiterate their conclusions that Act 42 is not narrowly tailored to fit any compelling interest.

III

CONCLUSION

I am gravely disturbed by the history of racial discrimination in this country and State, but I believe that segregation of voters by race will achieve nothing but more discrimination, more separation, more animosity and would push Justice Harlan's and Dr. King's dream for this nation ever further into the future. One hundred and thirty years ago this nation endured a bloody civil war to ensure freedom and equality for all. That pledge,

so dearly bought, remains elusive, but the concept that people defined only by race should receive separate representation in the legislative bodies of our government mocks the goals for which so many have suffered and died. Indeed, in my opinion, it breathes life into the discredited doctrine announced by the majority in *Plessy*, forty years after the Supreme Court administered what **should** have been its mortal wound.

The districts created under Act 42 are the creatures of a racial gerrymander. The circumstantial and direct evidence supported no other conclusion. Therefore, strict scrutiny applies to Act 42. Under that regime, the justifications offered by the State for its race-based measures were not accompanied by the requisite factual predicate. Additionally, the measures taken were not narrowly tailored to fit the interests, however baseless, advanced by the State.

UNITED STATES OF AMERICA

STATE OF LOUISIANA

Fox McKeithen

SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that the annexed and following pages contain a true and correct copy of Act No. 42 of the 1992 Regular Session of the Louisiana Legislature as shown by comparison with the original bound volume on file in the archives of this office.

APPENDIX C

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, this the 17th day of March, 1994

/s/ Fox McKeithen
Secretary of State
[SEAL]

ACT No. 42

SENATE BILL NO. 130

BY SENATOR BAGNERIS AND REPRESENTATIVES A. ALEXANDER, ARMSTRONG, T. CARTER, W. CARTER, COPELIN, CURTIS, DIXON, GREEN, GUIDRY, HOLDEN, HUDSON, HUNTER, JETSON, MITCHELL, MURRAY, PIERRE, PRATT, QUEZAIRE, SIMPKINS, WARREN, WESTON, AND WILKERSON

AN ACT

To enact R.S. 18:1276.3 and to repeal R.S. 18:1276.2; to provide for the redistricting of the state's congressional districts by reapportioning the population into seven congressional districts; to provide for the terms of members of congress currently serving; to provide for filing vacancies based on the districts; to provide with respect to elected and appointed positions and offices, other than congressional, which are based upon congressional districts; to provide for the effectiveness of the Act; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 18:1276.3 is hereby enacted to read as follows:

§1276.3. Congressional districts

R.S. 18:1276.3 is all proposed new law.

(A) Louisiana is divided into seven congressional districts, and the qualified electors of each district shall elect one representative to the Congress of the United States.

(1) The first district is composed of that portion of Jefferson Parish designated as Precincts 1-H, 2-H, 3-H, 4-H, 5-H, 6-H, 7-H, 8-H, 9-H, 1-K, 2-K, 3-K, 4-K, 5-K, 6-K, 7-K, 8-K, 9-K, 10-K, 11-K, 12-K, 13-KA, 15-K, 16-K, 17-K, 18-K, 19-K, 20-K, 25-K, 27-K, 28-K, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64,

65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90,91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 132, 134, 135, 136, 137, 138, 170, 172, 175, 176, 177, 178, 179A, 182, 183, 184, 185, 186, 190, 191, 192, 193, 194A, 195, and 210; that portion of Livingston Parish designated as Precincts 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 42, 5A, and 43; that portion of Orleans Parish designated as Precincts 3-20, 4-8, 4-9, 4-10, 4-10A, 4-11, 4-12, 4-13, 4-13A, 4-14, 4-14A, 4-15, 4-16, 4-16A, 4-17, 4-17A, 4-18, 4-18A, 4-19, 4-20, 4-20A, 4-21, 4-21A, 4-22, 4-23, 5-12, 5-13, 5-14, 5-15, 5-16, 5-17, 5-18, 5-19, 7-33A, 7-40, 7-41, 7-42, 12-4, 13-1, 14-1, 14-2, 14-3, 14-4, 14-8, 14-9, 14-10, 14-11, 14-14, 14-15, 16-2, 17-1, 17-17, 17-18, 17-18A, 17-18B, 17-19, 17-19A, 17-20, and 17-21; that portion of St. Helena Parish designated as Precincts 2-2, 6-1, 6-2, 2-3, and 3-2; St. Tammany Parish; that portion of Tangipahoa Parish designated as Precincts 01, 15, 16, 17, 26, 27, 28, 33, 40, 41, 44, 45, 48, 49, 70, 71, 72, 73, 74, 101, 102, 104, 106, 108, 110, 111, 112, 113, 114, 116, 117, 118, 120, 121, 122, 124, 125, 127, 131, 133, 133-A, 133-B, 133-C, 135, 137, 139, 141, 143, 145, 147, 149, 151, 40A, 104A, 117A, 120A, 121A, 135A, and 139A; and Washington Parish.

(2) The second district is composed of that portion of Jefferson Parish designated as Precincts 1-G, 2-G, 3-G, 4-G, 5-G, 6-G, 7-G, 8-G, 9-G, 10-G, 11-G, 14-K, 21-K, 22-K, 23-K, 24-K, 26-K, 29-K, 30-K, 31-K, 32-K, 33-K, 1-LA, 1-W, 2-W, 3-W, 4-W, 5-W, 6-W, 7-W, 104, 107, 115, 131, 133, 150, 151, 152, 153, 154, 155, 156, 157A, 171, 173, 174, 180, 181, 187, 188, 189, 196, 211, 212, 213A, 214, 215, 225, 226, 231,

232, 236, 246A, 13-KB, 157B, 179B, 194B, 213B, 213C, and 246B; and that portion of Orleans Parish designated as Precincts 1-1, 1-2, 1-5, 1-6, 1-7, 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-6A, 2-7, 3-1, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-10, 3-12, 3-13, 3-14, 3-15, 3-16, 3-17, 3-18, 3-19, 4-2, 4-3, 4-4, 4-5, 4-6, 4-7, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-10, 5-11, 6-1, 6-2, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9, 7-1, 7-2, 7-4, 7-4A, 7-5, 7-6, 7-7, 7-8, 7-9, 7-9A, 7-10, 7-11, 7-12, 7-13, 7-14, 7-15, 7-16, 7-17, 7-18, 7-19, 7-20, 7-20A, 7-21, 7-22, 7-23, 7-24, 7-25, 7-25A, 7-26, 7-26A, 7-27, 7-27A, 7-27B, 7-28, 7-28A, 7-29, 7-30, 7-31, 7-32, 7-33, 7-34, 7-35, 7-36, 7-36A, 7-37, 7-37A, 7-38, 7-38A, 7-39, 8-1, 8-2, 8-4, 8-5, 8-6, 8-7, 8-8, 8-9, 8-10, 8-11, 8-12, 8-13, 8-14, 8-15, 8-16, 8-17, 8-18, 8-19, 8-20, 8-21, 8-22, 8-23, 8-24, 8-25, 8-25A, 8-26, 8-26A, 8-27, 8-27A, 8-28, 8-29, 8-30, 9-1, 9-2, 9-3, 9-3A, 9-3B, 9-4, 9-5, 9-5A, 9-6A, 9-6B, 9-6C, 9-6D, 9-6E, 9-6F, 9-7, 9-8, 9-8A, 9-8B, 9-9, 9-10, 9-11, 9-12, 9-13, 9-14, 9-15, 9-16, 9-17, 9-18, 9-19, 9-20, 9-21, 9-22, 9-23, 9-24, 9-25, 9-25A, 9-26, 9-26A, 9-27, 9-28, 9-28A, 9-28B, 9-28C, 9-28D, 9-28E, 9-28F, 9-29, 9-29A, 9-30, 9-30A, 9-31, 9-31A, 9-31B, 9-31C, 9-31D, 9-31E, 9-32, 9-33, 9-33A, 9-34, 9-34A, 9-35, 9-35A, 9-36, 9-36A, 9-36B, 9-36C, 9-37, 9-37A, 9-38, 9-38A, 9-38B, 9-39, 9-39A, 9-39B, 9-40, 9-40A, 9-40B, 9-40C, 9-41, 9-41A, 9-41B, 9-41C, 9-41D, 9-42, 9-42A, 9-42B, 9-42C, 9-42D, 9-42E, 9-43, 9-43A, 9-43B, 9-43C, 9-43D, 9-43E, 9-43F, 9-43G, 9-43H, 9-43I, 9-43J, 9-43K, 9-43L, 9-43M, 9-43N, 9-44, 9-44A, 9-44B, 9-44C, 9-44D, 9-44E, 9-44F, 9-44G, 9-44H, 9-44I, 9-44J, 9-44K, 9-44L, 9-44M, 9-44N, 9-44O, 9-44P, 9-44Q, 9-45, 9-45A, 10-3, 10-4, 10-5, 10-6, 10-7, 10-8, 10-9, 10-10, 10-11, 10-12, 10-13, 10-14, 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-7, 11-8, 11-9, 11-10, 11-12, 11-13, 11-14, 11-15, 11-16, 11-17, 11-18, 11-19, 12-1, 12-2, 12-3, 12-5, 12-6, 12-7, 12-8,

12-9, 12-10, 12-11, 12-12, 12-13, 12-14, 12-15, 12-16, 12-17, 12-18, 12-19, 12-20, 13-2, 13-3, 13-4, 13-5, 13-6, 13-7, 13-8, 13-9, 13-10, 13-11, 13-12, 13-13, 13-14, 13-14A, 13-15, 13-16, 14-5, 14-6, 14-7, 14-12, 14-13, 14-13A, 14-16, 14-17, 14-18, 14-18A, 14-19, 14-20, 14-21, 14-22, 14-23, 14-24, 14-24A, 14-25, 14-26, 14-26A, 15-1, 15-2, 15-3, 15-4, 15-5, 15-6, 15-7, 15-8, 15-9, 15-10, 15-11, 15-11A, 15-12, 15-12A, 15-13, 15-13A, 15-13B, 15-14, 15-14A, 15-14B, 15-14C, 15-14D, 15-14E, 15-14F, 15-14G, 15-15, 15-15A, 15-15B, 15-16, 15-17, 15-17A, 15-17B, 15-18, 15-18A, 15-18B, 15-18C, 15-18D, 15-18E, 15-18F, 15-19, 15-19A, 15-19B, 15-19C, 16-1, 16-1A, 16-3, 16-4, 16-5, 16-6, 16-7, 16-8, 16-9, 17-2, 17-3, 17-4, 17-5, 17-6, 17-7, 17-8, 17-9, 17-10, 17-11, 17-12, 17-13, 17-13A, 17-14, 17-15, and 17-16.

(3) The third district is composed of that portion of Ascension Parish designated as Precincts 4A,5A,6, 7A, 9, 10A & 10B, 11A & 11B, 12, 13, 14, 15, 16A & 16B, 21A & 21B, 22A, 23, 27A, 28, 29, 31, 32, 33, 34, 35A, 36, 37, 40, 41, 42, 4B, 5B, 5C, 7B, 22B, 27B, and 35B; Assumption Parish; Iberia Parish; that portion of Iberville Parish designated as precinct 4; that portion of Jefferson Parish designated as Precincts 1-GI, 2-L, 216, 227, 228, 229, 230, 233, 234, 235, 247, 248, 249, 250, and I-LB; Lafourche Parish; Plaquemines Parish; St. Bernard Parish; St. Charles Parish; St. James Parish; St. John the Baptist Parish; that portion of St. Martin Parish designated as Precincts 1-2 and 1-5; St. Mary Parish; and Terrebonne Parish.

(4) The fourth district is composed of that portion of Ascension Parish designated as Precincts 1, 2A & B, 3, and 8A & 8B; that portion of Avoyelles Parish designated as precincts, 7-2, 7-3, 9-2, 9-6, 10-1, 10-4, 7-3A, 8-2A, 9-6A, and 10-6A; that portion of Bossier Parish designated as

Precincts 2-5, 2-8, 3-1, 3-2, 3-3, and 3-4; that portion of Caddo Parish designated as Precincts 1, 3, 5, 6, 23, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 44, 45, 46, 50, 51, 54, 57, 58, 59, 60, 61, 64, 65, 66, 67, 71, 73A & 73B, 80, 81, 86, 130, 131, 140, 141, 145, 154, 155 and 99; that portion of Claiborne Parish designated as Precincts 1, 21, 3, 10, 11, 8, 91, 81, 36, 34, 31, 82, 88, 86, 22, 96, 12, 37, 35, 89, and 87; that portion of Concordia Parish designated as precincts 1-1, 1-2, 1-3, 1-4, 2-3, 2-4, 3-1, 3-2, 3-3, 3-4, 4-3, 4-4, 4-5, and 4-6; that portion of East Baton Rouge Parish designated as Precincts 1-1A & B, 1-3A & B, 1-4, 1-5, 1-6, 1-10, 1-11, 1-13A & B, 1-14A & B, 1-15A & B, 1-16, 1-17, 1-18, 1-19, 1-20, 1-21, 1-22, 1-23, 1-24, 1-25, 1-26, 1-27, 1-28, 1-29, 1-30, 1-31A & B, 1-32, 1-36A & B & C & D, 1-37, 1-38A & B, 1-45, 1-50A & B, 1-51A & B, 1-58A & B, 1-59, 1-61, 1-62, 1-63, 1-67, 1-68, 1-73A & B, 1-76A & B & C & D, 1-84A & B, 1-85A & B, 1-86A & B, 1-91, 1-92A & B, 1-93, 1-94A & B, 1-95A & B, 1-96A & B, 2-1A & B , 2-5A & B, 2-5F, 2-5G, 2-5C, 2-5D, 2-6A & B, 2-5E, 2-9A & B, 2-11A & B, 2-12A & B & C, 2-14A & B & C & D, 2-16A & B, 2-20, 2-21A & B & C, 2-22, 2-23A & B, 2-24, 2-25A & B, 3-5A & B, 2-26, 2-26A, 2-26B, Industrial Complex, Industrial Complex A, and Industrial Complex B; East Carroll parish; East Feliciana Parish; that portion of Iberville Parish designated as Precincts 1, 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 19, 23, 24, and 25; that portion of Lafayette Parish designated as Precincts 15, 17, 18, 19, 22, 23, 24A, 50, 51, 54, 55, 56, 57, 58, 59, 61, 62, 63, 67, 68, and 24B; that portion of Lincoln Parish designated as Precincts D-1, E-1, F-1, G-1, 1-A-G, 1-D-E, 2-A, 2-B, 2-A-B, 3-1, 3-2, and 3-5; that portion of Livingston Parish designated as Precincts 3, 5, 7, 21, 27, 3A, and 24A; that portion of Madison

Parish designated as Precincts 1-A, 1-B, 1-C, 3-C, 4-A, 4-B, 5-A, 6-A, 6-B and 7-B; that portion of Morehouse Parish designated as Precincts 6, 7, 8, 9, 10, 11, 21, 22, 23, 24, 25, 26, 29, 31, 32, 33 and 34; that portion of Ouachita Parish designated as Precincts 2-4, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 3-9, 3-11, 3-12, 3-13, 3-14, 3-15, 3-16, 3-17, 10-7, 10-8, 10-12, 10-13, 10-17, and 10-22; that portion of Pointe Coupee Parish designated as Precincts 1, 2, 3, 4, 5, 6, 9, 11, 12, 13, and 14; that portion of Rapides Parish designated as Precincts 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55, 56, 58, 74, 81, 82, 83 and 84; that portion of St. Helena Parish designated as Precincts 1-1, 2-1, 3-1, 4-1, 5-1, and 5-2; that portion of St. Landry Parish designated as Precincts 1-1, 1-2, 1-4, 1-7, 1-9, 1-11, 1-13, 1-15, 1-16, 1-18, 1-20, 1-22, 1-25, 1-27, 1-29, 4-1, 4-4, 4-8, 4-9, 4-10, 4-11, 4-15, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, and 5-3A; that portion of St. Martin Parish designated as Precincts 1-4, 2-1 & 2-3, 3-1, 4-3, 4-5, 3-7, 3-3, 1-6, 3-5, and 3-9; that portion of Tangipahoa Parish designated as Precincts 02, 06, 11, 18, 42, 43, 46, 47, 103, 105, 107, 109, 115, 119, 123, 129, 133-D, 11A, 41A, 106A, and 115A; Tensas Parish; that portion of Union Parish designated as Precincts 2-1, 2-3, 3-1, 3-3, 6-1, 6-3, 9-1, 9-3, 9-5, 9-4, 3-4, 9-6, and 2-4; that portion of Webster Parish designated as Precincts 2-1, 2-2, 2-5, 2-6, 2-10, 2-12, 2-14, 2-15, and 2-18; that portion of West Baton Rouge Parish designated as Precincts as 3-3, 3-4, 4-4, 4-6, 5-1, 5-2, 6-2, and 4-2B; that portion of West Carroll Parish designated as Precincts 15, 16, and 17; and West Feliciana Parish.

(5) The fifth district is composed of Bienville Parish; that portion of Bossier Parish designated as Precincts 1-1, 1-2, 1-3, 1-4, 1-5, 2-1, 2-2, 2-3, 2-4, 2-6, 2-7, 2-9, 2-10, 2-11,

2-12A, 2-13, 2-14, 2-15, 2-16, 2-17A, 2-18A, 2-19, 2-20, 2-21A, 2-22, 2-23, 4-1, 4-2, 4-3A, 4-4, 4-5, 4-6, 4-7, 4-8A, 4-9, 4-10, 4-11A, 2-12B, 2-12C, 2-17B, 2-18B, 2-18C, 2-21B, 4-3B, 4-3C, 4-3D, 4-8B, 4-8C, 4-11B, and 4-11C; that portion of Caddo Parish designated as precincts 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 36, 43, 47, 48, 49, 52, 53, 55, 56A & 56B, 62, 63, 68, 69, 70, 72, 74, 75, 76A & 76B, 77, 78, 79, 82A & 82B, 83A & 83B, 84, 85A & 85B, 87, 88, 89A & 89B & 89C, 90A & 90B, 91A & 91B, 92, 93, 94, 95A & 95B, 96, 97A & 97B, 122, 123, 124, 125, 126, 127, 128, 129, 132A & 132B, 133, 134, 135, 136, 137A & 137B, 138, 139, 142, 143, 144, 146, 147, 149, 150, 151, 152, 153, 156, 157, 158, 159, and 98; that portion of Claiborne Parish designated as Precincts 41, 5, 6, 7, 92, 51, 84, 42, 93, 94, 95, 83, and 85; DeSoto Parish; Franklin Parish; Jackson Parish; that portion of Lincoln Parish designated as precincts A-1, A-2, B-1, B-2, C-1, 1-B-C, F-2, 3-3, 3-4, 4-1, 4-2, 4-3, 4-4, 4-5, 5-1, 5-2, 5-3, and 5-4; that portion of Madison Parish designated as Precincts 2-A, 2-B, 2-C, 2-D, 2-E, 2-F, 3-A, 3-B, 7-A, 8-A, 8-B, and 8-C; that portion of Morehouse Parish designated as Precincts 1, 2, 3, 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 20, 27, 28, and 30; Natchitoches Parish; that portion of Ouachita Parish designated as precincts 1-1, 1-2, 1-3, 1-4, 1-4A, 1-5, 2-1, 2-2, 2-3, 3-10, 4-1, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, 5-7, 5-8, 5-9, 5-10, 5-11, 5-12, 5-13, 5-14, 5-15, 5-16, 5-17, 5-18, 5-19, 5-20, 6-1, 6-2, 7-1, 8-1, 8-2, 9-1, 10-1, 10-2, 10-3, 10-4, 10-5, 10-6, 10-9, 10-10, 10-11, 10-14, 10-15, 10-16, 10-18, 10-19, 10-20, 10-21, 4-2, and 5-21; Red River Parish; Richland Parish; that portion of Union Parish designated as Precincts 1-1, 1-2, 2-2, 3-2, 4-1, 4-2, 4-3, 5-1, 5-2, 6-2, 6-4, 7-1, 7-2, 7-3, 8-1, 8-2, 8-3, 9-2, 9-7, 4-4, 3-5, 1-3, and 5-3; that portion of

Webster Parish designated as Precincts 1-1, 1-2, 1-3, 1-4, 1-5, 1-6, 1-7, 1-8, 1-9, 1-10, 1-11, 1-12, 1-13, 1-14, 1-15, 1-16, 1-17, 1-18, 1-19, 1-20, 1-21, 1-22, 1-23, 1-24, 1-25, 1-26, 1-27, 1-28, 2-3, 2-4, 2-7, 2-8, 2-9, 2-11, 2-13, 2-16, 2-17, 2-19, and 2-20; that portion of West Carroll Parish designated as Precincts, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 5A, 12A, and 14A; and that portion of Winn Parish designated as Precincts 1-1, 2-1, 5-1, 6-1, 8-1, 8-2, 8-3, 9-2, and 9-3.

(6) The sixth district is composed of that portion of Avoyelles Parish designated as Precincts 1-1, 1-2, 1-3, 1-4, 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-7, 2-8, 3-1, 3-2, 3-3, 3-4, 4-1, 4-2, 4-3, 4-4, 5-1, 5-2, 6-1, 6-2, 7-1, 8-1, 8-2, 8-3, 9-1, 9-3, 9-4, 9-5, 10-2, 10-3, 10-5, 10-6, 11-1, 11-2, 11-3, 2-1A, 2-2A, 2-4A, 2-5A, 2-5B, 2-5C, 2-5D, 2-6A, 2-7A, 2-7B, 2-8A, 3-1A, 3-1B, 3-3A, 3-3B, 3-3C, 4-4A, 8-2B, 8-3A, 9-1A, 9-4A, 9-4B, 9-5A, 9-5B, 9-5C, 9-5D, 11-2A, 11-2B, and 11-3A; Caldwell Parish; Catahoula Parish; that portion of Concordia Parish designated as precincts 2-1, 2-2, 4-1, 4-2, 5-1, 5-2, 5-3, 5-4, 5-5, 5-6, and 5-7; that portion of East Baton Rouge Parish designated as precincts 1-7, 1-8, 1-33, 1-34A & B, 1-35, 1-39, 1-40, 1-41, 1-42, 1-43, 1-44, 1-46A & B & C & D, 1-48A & B, 1-49A & B, 1-52A & B, 53A & B & C & D, 1-54A & B, 1-55A & B, 1-56A & B, 1-57, 1-60A & B, 1-64, 1-65, 1-69A & B, 1-71A & B & C & D, 1-72A & B & C, 1-74A & B & C, 1-75A & B & C & D, 1-78A & B, 1-79, 1-80, 1-81, 1-82A & B & C & D, 1-83A & B, 1-87, 1-88A & B, 1-89, 1-90, 1-97, 1-98A & B, 1-99A & B & C, 2-3, 2-4A & B & C & D, 2-7A & B, 2-13A & B, 2-15, 2-17A & B, 3-1A & B & C & D, 3-3A & B & C & D, 3-4A & B & C & D, 3-8A & B & C & D, 3-9A & B & C & D, 3-11A & B & C & D, 3-12A & B & C & D, 3-13A & B, 3-14A & B & C, 3-17E, 3-17F, 3-17A & B & C & D, 3-17G, 3-17H, 3-17I, 3-17J, 3-21A & B & C &

D, 3-22A & B & C & D, and 3-23A & B & C & D; that portion of Evangeline Parish designated as Precincts 1-2, 1-3, 1-7, 1-13, 1-15, 5-1, 5-2, 5-3, and 5-5; Grant Parish; that portion of Iberville Parish designated as Precincts 9, 14, 17, 18, 20, 21, 22, 26, 27, 28, 29, 30, 31, and 32; LaSalle Parish; Livingston Parish designated as Precincts 1, 2, 4, 23, 24, 25, 26, 28, 39, 40, and 41; that portion of Pointe Coupee Parish designated as Precincts 7, 8, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28; that portion of Rapides Parish designated as Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 17A, 17B, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 38A, 39, 50, 51, 52, 53, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 90, 91, 92, 93, 29A, and 80A; Sabine Parish; that portion of St. Landry Parish designated as Precincts 1-5, 1-6, 1-8, 1-10, 1-12, 1-14, 1-17A, 1-19, 1-21, 1-23, 1-25, 1-26, 1-28, 4-2, 4-3, 4-5, 4-6, 4-7, 4-12, 4-13, 4-14, 4-16, and 5-1; Vernon Parish; that portion of West Baton Rouge Parish designated as Precincts 1-1, 1-2, 1-3, 2-1, 2-2, 2-3A, 3-1, 3-2, 4-1A, 4-2A, 4-3, 4-5A, 6-1, 6-3, 7-1, 7-2, 7-3, 7-4, 7-5, 2-3B, 2-3C, 4-1B and 4-5B; and that portion of Winn Parish designated as Precincts 1-3, 4-1, 6-2, 7-1, 7-2, 9-1, 10-1, 10-2, 10-3, 11-1, 11-2, 11-3, 11-4, 12-1, 12-2, and 12-3.

(7) The seventh district is composed of Acadia Parish; Allen Parish; Beauregard Parish; Calcasieu Parish; Cameron Parish; that portion of Evangeline Parish designated as Precincts 1-1, 1-4C, 1-4R, 1-5, 1-6, 1-8, 1-9C, 1-9R, 1-10, 1-11, 1-12, 1-14, 1-16, 1-17C, 1-17R, 1-18C, 1-18R, 1-19, 2-1, 2-2, 2-3, 2-4, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8, 4-1C, 4-1R, 4-2, 4-3, 4-4, 5-4C, and 5-4R; Jefferson Davis Parish; that portion of Lafayette Parish designated as

Precincts 1, 2, 3A, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 20, 21, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34A, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 53, 60, 64, 65, 66, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 3B, and 34B; that portion of St. Landry Parish designated as Precincts 1-3, 1-17, 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-7, 2-8, 2-9, 2-10, 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 6-1, 6-2, 6-3, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9, 6-10, 6-11, 6-12, 6-13, 6-14, 6-15, 6-16, and 6-17; that portion of St. Martin Parish designated as Precincts 1-1, 1-3, 2-2, 3-2, 4-6, 3-4, 4-1, 4-2, 4-4, 5-1, 5-2, 5-3 & 5-4, 6-1, 6-2, 6-3, 6-4, 7-1, 7-2, 7-3, 7-4, 8-1, 9-4, 8-3, 8-4, 9-1, 9-2, 9-3, 2-4, 1-7, 3-8, 3-6, 8-2, and 9-5; and Vermilion Parish.

Section 2.(A) The precincts enumerated in Section 1 of this Act are the precincts existing as of April 1, 1991 established by the governing authority of each parish in conformity with R.S. 18:532, or the precincts subsequently changed by ordinance of the respective parish governing authority under the provisions of R.S. 18:532.1(H) and validated by the Legislature of Louisiana prior to March 1, 1992.

(B) With respect to any precincts referenced in this Act that has been subdivided by action of any parish governing authority or registrar of voters on a non-geographic basis, or subdivided by action of the parish governing authority on a geographic basis under the provisions of R.S. 18:532.1(H), the reference in this Act to a precinct shall be construed to include all polling or geographic subdivisions thereof irrespective of the creation of such subdivision by a parish governing authority or registrar of voters.

(C) In any case in which a precinct as established by the parish governing authority includes an area of population which has been given an alphabetical designation in addition to the numerical designation for the purpose of convenience and clarity in taking and reporting the census count by the United States Bureau of the Census, the assignment of such precincts includes any alphabetically designated portion unless otherwise specifically enumerated in this Act.

Section 3.(A) This Act shall not reduce the term of office of any member of the Congress who was elected in the 1990 congressional election.

(B) A vacancy in the representation of any congressional district which is filled after the effective date of this Section shall be filled as provided by law from that district as it is described in this Section.

(C) This Act shall not reduce the term of any person holding any position or office on the effective date of this Section for which the appointment or election is based upon a congressional district.

Section 4. R.S. 18:1276.2 is hereby repealed.

Section 5. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana.

Approved by the Governor, June 1, 1992.

Published in the Office Journal of the State:

June 26, 1992.

A true copy:

W. Fox McKeithen
Secretary of State

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RAY HAYS, ET AL., CV 92-1522

VERSUS JUDGES WIENER, SHAW & WALTER

STATE OF LOUISIANA, ET AL.,

JUDGMENT

(Filed Dec 29, 1993)

Considering the Memorandum Opinion and Concurring Opinion filed with this court on December 28, 1993, and in accordance with **Rule 58 of the Federal Rules of Civil Procedure,**

IT IS ADJUDGED that Act 42 of 1992 of the State of Louisiana is unconstitutional, and the redistricting plan embodied therein is null and void;

IT IS FURTHER ADJUDGED that the State of Louisiana is enjoined from holding any future congressional elections based on the plan contained in Act 42 of 1992 of the State of Louisiana;

IT IS FURTHER ADJUDGED that, while the 1992 congressional elections are not invalidated, the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the plan in Act 42 of 1992 of the State of Louisiana, and each district created under such plan, shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, and such terms of office and such districts shall not

be extended or carried over into the next Congress in any manner whatsoever.

Signed and entered upon the docket of this court on this 29th day of December, 1993.

/s/ Robert H. Shemwell
Robert H. Shemwell
Clerk of Court

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CIVIL ACTION NO. CV92-1522S

RAY HAYS, EDWARD L. ADAMS, SUSAN SHAW SINGLETON, GARY STOKLEY

Plaintiffs,

VS.

STATE OF LOUISIANA, EDWIN W. EDWARDS, in his official capacity as Governor of the State of Louisiana, SAMUEL B. NUNEZ, JR., in his official capacity as President of the Louisiana State Senate; JOHN A. ALARIO, JR., in his official capacity as Speaker of the House for the State of Louisiana; W. FOX MCKEITHEN, in his official capacity as Secretary of State for the State of Louisiana, JERRY FOWLER, in his official capacity as Commissioner of Elections for the State of Louisiana, and certain UNIDENTIFIED STATE LEGISLATORS

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed Jan 26, 1994)

Notice is hereby given that the defendants, the STATE OF LOUISIANA, EDWIN W. EDWARDS, in his official capacity as Governor of the State of Louisiana, SAMUEL B. NUNEZ, JR., in his official capacity as President of the Louisiana State Senate; JOHN A. ALARIO, JR., in his official capacity as Speaker of the House for the State of Louisiana, W. FOX MCKEITHEN, in his official capacity as Secretary of State for the State of Louisiana, and JERRY FOWLER, in his official capacity as Commissioner of Elections for the State of Louisiana, hereby appeal to the Supreme Court of the United States from the Judgment of the United States District Court, Western District of Louisiana (Three Judge Panel) that declared Act 42 of the 1992 of the State of Louisiana, and the redistricting plan embodied therein, null and void, and enjoined the State of Louisiana from holding any future congressional elections based on the plan contained in Act 42 of 1992, and further adjudged that the terms of office of each member of the United States House of Representatives from Louisiana who represents a district created by Act 42 of 1992 shall expire *ipso facto* at noon on the third day of January 1995 and such terms of office shall not be extended or carried over into the next Congress, said judgment rendered by the United States District Court, Western District of Louisiana on December 29, 1993.

This appeal is taken pursuant to 28 U.S.C. 1253.

Respectfully submitted,

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Attorney General

/s/ Roy A. Mongrue, Jr.,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES has been served upon opposing counsel of record by depositing same in the U. S. Mails, postage prepaid, this 26 day of January, 1994.

/s/ Roy A. Mongrue, Jr.
Roy a. Mongrue, Jr.

Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

No. 93-1539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Western District of Louisiana

---

MOTION TO AFFIRM

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31pp

QUESTION PRESENTED

Whether the district court properly held, in accordance with well settled law, including this Court's decision in *Shaw v. Reno*, that the State of Louisiana's congressional apportionment plan, as embodied in Act 42 of the 1992 Regular Session of the Louisiana Legislature, violated the plaintiffs' rights to equal protection of the laws as guaranteed by the United States Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1539

STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Western District of Louisiana

---

MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees move this Court to affirm the judgment of the three-judge panel of the United States District Court for the Western District of Louisiana. In light of this Court's clear decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the unanimous and thorough opinion of the court below meticulously applying *Shaw*, and the egregious violation of the Equal Protection Clause established by the undisputed facts, the resolution of the question presented is manifest. The decision below is based on settled law, and the factual underpinnings of the court's holding are firmly supported and not clearly erroneous. Fed.R.Civ.P. 52(a). No further argument is required.

STATEMENT OF THE CASE

This case presents the Court with a stark, purposeful state-ordered segregation of Louisiana's citizens on the basis of race. Specifically, this case centers on Louisiana's racial gerrymander of its Congressional Districts and, in particular, District 4. Given the dictates of *Shaw*, the bizarre contours of District 4 superimposed on a map of the state of Louisiana condemn this as racially-inspired gerrymandering. Precisely as in *Shaw*, the Court is confronted with "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw*, 113 S.Ct. at 2832.

At first glance, District 4 appears more like the work of an abstract artist than the result of the considered judgment of state legislators attempting to comply with the United States Constitution. The district court set forth this telling description of District 4:

> District 4 snakes narrowly across Louisiana soil from end to end for more than 600 miles. A rectangle superimposed on the Z-shaped figure formed by District 4 would overlay two-thirds of the State. Additionally, as it winds along its erratic path, District 4 projects myriad diverticulae to encapsuate small sacs of otherwise widely dispersed black voters. No one could claim that District 4 is compact, at least not with a straight face.

(J.S. App. 29).[1] In addition, "at some places along its attenuated path, District 4 is no more than 80 feet wide.

---

[1] The district court offered several apt descriptions of District 4, including the following:

> Like the fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "Z" across the state, as it cuts a swath through much of Louisiana. It begins north of Shreveport—in the northwestern corner of

Such tokenism mocks the traditional criterion of contiguity." (J.S. App. 30).

After acknowledging testimony that "there is no more fundamental unit of societal organization in the history of Louisiana than the parish," (J.S. App. 30), the court below discussed District 4's effect on the parish system:

> Whereas the previous congressional plan divided only seven of modern Louisiana's 64 parishes, scattering fractions of the same parish in more than one congressional district, Act 42 splits and scatters 28. District 4 is particularly aggressive in violating the boundaries of these traditional political and governmental units of the State: of the 28 parishes touched by District 4, only four whole parishes are included; but the district annexes only shards of 24 additional parishes, usually incorporating none but the predominantly black fragments of those shattered regions. Additionally, for the first time in Louisiana history, with the advent of Act 42 a districting plan *violates the boundaries of nearly all major municipalities in the State.*

(J.S. App. 30) (emphasis added).

> Louisiana, just east of the Texas border and flush against the Arkansas border—and sweeps along east that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. This district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominatly black residential neighbors. Finally, at its southern extremity, the district extends yet another projection—this one westward towards Lafayette—adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the legislature engaged in racial gerrymandering.
>
> (J.S. App. 27-28).

The facts in this case are even more egregious than in *Shaw*. The three-judge court was not forced to rely solely on the fact that the Louisiana districting scheme was so bizzare that it could only be understood as the product of racial gerrymandering. Indeed, those responsible for the scheme testified under oath that race, and race alone, drove the line-drawing.

This case was heard by a special three-judge panel of the United States District Court of the Western District of Louisiana. Appellees, long-time citizens of Lincoln parish, Louisiana, challenged on several grounds Louisiana's established statewide districting plan for electing Louisiana's delegation to the United States House of Representatives. The Louisiana legislature enacted the challenged Congressional districting scheme subsequent to the 1990 census in Act 42 of the 1992 Regular Session ("Act 42"). Appellees filed their suit in June 1992, less than six weeks after the enactment of Act 42 and immediately upon preclearance of the plan by the United States Department of Justice.

The district court held a trial on the merits on August 26 and 27, 1992. The district court was aware that *Shaw v. Reno,* 113 S.Ct. 2816 (1993), essentially an identical case originating in North Carolina, was then under consideration by this Court. The district court therefore held this case under advisement until issuance of this Court's decision in *Shaw*.

In response to *Shaw,* the three-judge court requested supplemental briefing addressing *Shaw's* ramifications for this case. Specifically, the court focused on the issue whether Louisiana's Congressional districting scheme was the product of racial gerrymandering and, if so, whether the plan was "narrowly tailored to further a compelling government interest," as required by *Shaw*. *Shaw*, 113 S. Ct. at 2818. A second full evidentiary hearing was held on August 19 and 20, 1993, to address the issues raised by *Shaw*.

On December 28, 1993, the three-judge court issued its unanimous opinion (including a concurrence) striking down Louisiana's Congressional districting scheme and enjoining the State from conducting any future election pursuant to the plan.[2] The court held that Louisiana's entire Congressional districting plan, and District 4 in particular, "are the products of racial gerrymandering and are *not* narrowly tailored to further any compelling governmental interest." (J.S. App. 53) (emphasis in original). Thus, the court held, the plan violates the Equal Protection Clause; the court further ruled that the plan cannot form the basis for future elections, and will dissolve automatically by court order.

The court held as follows:

> [W]e declare Act 42 of 1992 to be unconstitutional and the redistricting plan embodied therein to be null and void; and we enjoin the State of Louisiana from holding any future congressional elections based on the Plan. We do not, however, invalidate the 1992 congressional elections held thereunder; but we do hold that the term of office of each member of the United States House of Representatives from Louisiana who represents a district created under the Plan—and each district thus created—shall expire, *ipso facto*, at noon on the 3rd day of January, 1995, such terms of office and such districts not to be extended or carried over into the next Congress in any manner whatsoever.

(J.S. App. 54).

---

[2] The Memorandum Opinion of the three-judge court is attached as Appendix B to the Jurisdictional Statement.

ARGUMENT

Appellants' Jurisdictional Statement is riddled with mischaracterizations, omissions, and caricatures of both this Court's decision in *Shaw* and the district court's decision in this case. Appellants' reliance on such caricatures bespeaks an understandable desperation. The districting plan at issue is indefensible. It cannot withstand scrutiny under the Equal Protection Clause.

I. THE DISTRICT COURT PROPERLY APPLIED *SHAW TO THIS CASE*

The Equal Protection Clause mandates that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its central purpose is "to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw*, 113 S.Ct. at 2824 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)). It prohibits not only express racial classifications appearing on the face of a statute, but also statutes that are facially neutral yet unexplainable, except perhaps by pretextual rationalizations, on grounds other than race. *Shaw*, 113 S.Ct. at 2825.

A. The *Shaw* Holding

In *Shaw*, this Court found the districting scheme at issue to be so bizarre on its face that it was "unexplainable on grounds other than race." *Id.* (citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Putting pretextual post hoc rationalizations aside, the *Shaw* Court determined that the districting scheme was the product of a broad racial classification. The constitutional violation was not merely the odd shape of the district itself, but also what the odd-shaped district indisputably proved—namely, that race had determined the shape of the district. The evil mandating strict scrutiny, therefore, was not merely the odd shape of the district, but the racial classifications made by the legislature in creating the district.

The *Shaw* Court likened such bizarre districts to the "uncouth twenty-eight-sided" municipal boundary line challenged in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). *Shaw*, 113 S.Ct. at 2823. *Gomillion* dealt with a statute that redrew the city limits of Tuskegee, Alabama. On its face, the statute was race-neutral—it contained no express racial classifications. However, the consequence of turning the city boundaries of Tuskegee from a square to a wild, unexplainable figure with twenty-eight sides was to remove from the city limits virtually all black voters and no white voters. The effect of the facially race-neutral statute, which segregated voters on the basis of race, was viewed as compelling evidence of discriminatory intent violative of the Constitution.

The majority in *Gomillion* resolved the case under the Fifteenth Amendment. *Gomillion*, 364 U.S. at 342-48. In his separate opinion, however, Justice Whittaker concluded that unlawful segregation of voters into different districts also implicated the Equal Protection Clause. *Id.* at 349 (Whittaker, J. concurring). As the *Shaw* court recognized, *Gomillion* and its progeny clearly establish that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption." *Shaw*, 113 S.Ct. at 2826.

B. The Problem of Proof as Discussed in *Shaw*

An issue addressed at length by *Shaw* was the difficulty of proving that facially neutral statutes are products of discriminatory intent. *Id.* at 2826-27. The Court expressly stated that "the difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Id.* at 2826.

The Court noted that despite the probem of proving discriminatory intent in the face of a facially neutral

statute, there were some instances, such as the one before it (as well as the situation in *Gomillion*), where the shape of the districts was so odd that the statute establishing them, albeit facially neutral, could fairly be understood only as an exercise in racial gerrymandering. The Court stated:

> The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race. Moreover, it seems clear to us that proof sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race. *Gomillion*, in which a tortured municipal boundary line was drawn to exclude black voters, was such a case. *So, too, would be a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions.* We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.

Id. at 2926-27 (citations omitted; emphasis added).

Shaw thus elucidates the distinction between the constitutional violation of racial gerrymandering and proof of such a violation. Racial gerrymanders implicate the Equal Protection Clause because they represent intentional racial segregation. Bizarrely shaped voting districts that travel the length and breadth of a state and include various twists, turns, and appendages in an attempt to encircle only members of a particular racial group present compelling evidence of a racial gerrymander. Such districts are therefore an effective, but not the exclusive, way of proving racial gerrymandering.

C. The District Court's Opinion Applying *Shaw*

The district court was faced with a case virtually identical to *Shaw*, but with facts that more clearly establish that Louisiana engaged in an unabashed racial gerrymander. First, District 4 itself is so irrational on its face that it can be understood only as an attempt to segregate voters into different voting districts because of their race. (J.S. App. 11-12). Second, all of the witnesses admitted that voters were, in fact, segregated into or out of this district solely or predominantly on the basis of race. (J.S. App. 39-43). Either branch of evidence, standing alone, supports application of strict scrutiny to Louisiana's districting scheme. Both exist here.

The district court went to considerable lengths to explain the point, addressed in *Shaw*, that racial gerrymandering may be proved either by inferential or direct evidence, or both. The district court recognized that "*Shaw* primarily deals with the problem of proving racial gerrymandering *indirectly* or *inferentially*" and that *Shaw* held that racial gerrymandering could be inferred from bizarrely shaped districts that "presumptively bespeak an impermissible purpose." (J.S. App. 14-15) (emphasis in original). The district court, however, also discussed the principle that provides the implicit foundation for the logic of *Shaw*, namely, that "racial gerrymandering may —*a fortiori*—also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on race." (J.S. App. 15).

The evidence presented below led the district court to this unanimous conclusion:

> If everyone—or nearly everyone—involved in the design and passage of a redistricting plan asserts or concedes that design of the plan was driven by race, then racial gerrymandering may be found without resorting to the inferential approach approved by the Court in *Shaw*. The Court recognized in *Shaw* that

> "[n]o inquiry into legislative purpose is necessary when the racial clasisfication appears on the face of the statute." The same is equally true when virtually unanimous, essentially uncontroverted *direct* trial evidence establishes racial classification, as it did here. In this case, we find overwhelming evidence—both *indirect* and *direct*—that the Plan is a product of racial gerrymandering.

(J.S. App. 15) (emphasis in original).[3]

The district court, then, properly applied the evidentiary foundations applied by *Shaw*. In relying on both inferential and direct proof of racial gerrymandering, the district court precisely applied the respective evidentiary burdens in this case. The court acknowledged *Shaw's* explicit holding that a citizen who alleges that a reapportionment scheme that is so irrational on its face that it can only be understood as an effort to segregate voters on the basis of race states an equal protection claim. (J.S. App. 22). Such an irrational district explainable on its face only as racial gerrymandering creates a presumption of unconstitutionality. The district court explained, however, that "if the state advances a legitimate, non-racial explanation for the plan's irregularity, then the factfinder must—as always—weigh the evidence on both sides and decide whether the plaintiff has met his burden of demonstrating that the plan's irrational shape reflects racial gerrymandering." (J.S. App. 23).

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[3] The district court also went to great lengths to distinguish between the concepts of *intent* and *motive*. This distinction, of course, is between "what" the legislature did versus "why" it did it. For purposes of determining whether strict scrutiny applies, the court need only look at whether the districting scheme is an *intentional* racial gerrymandering. A state's proferred *motives* for engaging in a racial gerrymander are irrelevant to the initial determination of whether strict scrutiny under the Equal Protection Clause applies to the plan. Such motives become relevant only after the court moves on to determine whether the motives rise to the level of a "compelling state interest." *See Shaw*, 113 S.Ct. at 2830.

The district court emphasized that "Supreme Court precedent clearly indicates that plaintiffs have the ultimate burden of proving—by a preponderance of the evidence—that the irregularity of the challenged districts reflects racial gerrymandering." (J.S. App. 23-24). Thus, the district court properly placed the burden of proof of gerrymandering on the plaintiffs, "reflect[ing] a basic tenet of equal protection analysis: there can be no violation of the Equal Protection Clause unless those who complain demonstrate that the state has engaged in purposeful discrimination." (J.S. App. 24) (citations omitted). The district court concluded that the plaintiffs comfortably met their burden in this case—the Louisiana districting scheme is clearly the product of racial gerrymandering.

II. LOUISIANA'S CONGRESSIONAL DISTRICTING SCHEME IS CLEARLY A PRODUCT OF RACIAL GERRYMANDERING

Louisiana has created and admitted to one of the clearest cases of racial gerrymandering ever confronted by a federal court. First, District 4 is so bizarrely shaped as to admit no other conclusion. Second, the districting scheme flouts every traditional districting standard. Third, the direct testimony of all involved in formulating the plan incontrovertibly establishes that the plan is a racial gerrymander.

A. District 4 Is So Bizarre That It Can Only Be Understood as the Product of Racial Gerrymandering

District 4 can only be explained as a racial gerrymander. The sole conceivable purpose for creating a Congressional district with such a contorted geographic shape was to segregate voters intentionally and solely on the basis of their race. Given the overwhelming majority of voters of one race included within District 4's erratic and otherwise irrational boundaries, its bizarre shape can only

make sense if it is a racially gerrymandered district. In short, racial segregation of voters was the solitary goal in creating District 4—a goal which triggers close scrutiny under equal protection principles. As the district court noted: "This intense scrutiny is justified by the grave danger that is posed to our constitutional order and national community when a state creates and administers laws based on the race of its citizens." (J.S. App. 13-14).

On its face, therefore, District 4 fits perfectly within the holding of *Shaw*. This Court held in *Shaw* that a plaintiff states a claim under the Equal Protection Clause by alleging that a State has "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Shaw*, 113 S.Ct. at 2832. District 4 unquestionably fits this description; therefore, plaintiffs-appellees stated a claim triggering strict scrutiny.

B. District 4 Flouts Every Traditional Districting Standard

As recognized in *Shaw*, traditional districting principles play a vital role in determining whether a districting plan is the product of racial gerrymandering. Such criteria are important not because they are constitutionally mandated, but because they are useful as an evidentairy mechanism since they are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Id.* at 2827. The *Shaw* court made this point forcefully:

> Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin,

> bears an uncomfortable resemblance to political apartheid.

Id.

Traditional districting principles, then, are a helpful indicator of the existence or absence of racial gerrymandering. To the extent such principles are followed, a State's contention that its districts are not the product of racial gerrymandering gains support. To the extent these principles are ignored, a plaintiff's claim that districts are racially gerrymandered is strengthened. It follows that the greater the degree of deviation from these principles by a districting scheme that encircles mainly voters of a particular race, the easier it becomes to establish a claim of racial gerrymandering.

Louisiana can hardly rely on traditional districting principles in attempting to explain in its districting scheme in non-racial terms. Here, every traditional districting principle has been ignored or flouted. The district court conducted a detailed analysis of each traditional districting principle, including compactness, contiguity, respect for established political subdivisions, and commonality of interests. Based on that painstaking analysis, the three-judge court determined that Louisiana's plan "cavalierly disregards" all of those principles. (J.S. App. 29). The court made the following findings and conclusions: (1) "No one could claim that District 4 is compact, at least not with a straight face"; (2) "at some places along its attentuated path, District 4 is no more than 80 feet wide. Such tokenism mocks the traditional criterion of contiguity"; (3) "In complementary fashion, District 6 maintains contiguity only by employing gossamer connections at several junctions"; (4) the plan "splits and scatters" 28 of Louisiana's heretofore nearly inviolate parishes; (5) District 4 itself fractures 24 of Louisiana's 64 parishes; (6) the plan "violates the boundaries of nearly all major

municipalities in the State; and (7) District 4, with its irregular boundaries, "subsumes bits of every religious, ethnic, economic, social, and topographical type found in Louisiana." (J.S. App. 29-31).

This case, then, falls squarely within the paradigmatic example offered in *Shaw*—where clear proof of racial gerrymandering "will not be difficult at all." *Shaw*, 113 S.Ct. at 2826. Here, the Court is faced with "a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at 2827. In short, Louisiana brings before this Court the quintessential case of racial gerrymandering.

C. Every Witness Admitted that the Districting Scheme is the Product of Racial Gerrymandering

This case presents additional evidence of racial gerrymandering beyond the bizarre shape of the district itself and its total disregard for traditional districting principles. The district court was confronted, in *two* full evidentiary hearings on the matter, with *direct* evidence and admissions that Louisiana's districting scheme is the product of racial gerrymandering.

The fortuitous timing of the hearings, in relation to the issuance of *Shaw*, makes this case unique with regard to the existence of direct proof of intentional racial gerrymandering. This is because the first hearing took place *before* this Court handed down its decision in *Shaw*. Accordingly, the witnesses testified free of temptation to skew testimony or present self-serving evidence in an effort to overcome *Shaw's* clear dictates. At the first hearing, the witnesses did not even attempt to conjure up disingenuous post hoc rationalizations. Instead, they repeatedly admitted the truth: this plan is the product of racial gerrymandering.

The examples of such testimony are numerous. Here are a few detailed by the district court:

> In response to this court's query whether the Legislature had created a racial gerrymander, Defendants' counsel—Mr. Mongrue—said, "[a]nd [racial gerrymandering]'s exactly what [the Legislature] can do . . . ." Similarly, Mr. Willie Hunter, a black state legislator and a fact witness for the Defendants, testified that the Legislature's *intention* "was to create a district where there was an excellent possibility of having another black elected . . . , and that to accomplish this they [the legislators] looked at numbers [of black voters] period." Professor Engstrom, and expert witness for the defense, stated unabashedly that "race drove . . . [the creation of] . . . the Districts."

(J.S. App. 40) (emphasis and alternations in original).

Still another state representative testified that "the only issue presented us was a racial issue" and stated that District 4 was created "for the sole purpose of making sure that an additional black district got created regardless of what it looked like and what parishes it ran through . . . ." (J.S. App. 40-41).

These admissions of racial gerrymandering continued at the second hearing. Several witnesses testified that the Legislature had specifically intended to sort voters on the basis of race and race alone. Witnesses testified that race was the "major element" and the "primary determiant" of the districting scheme. (J.S. App. 41). In short, "[n]ot one witness, Plaintiffs' or Defendants', testified that Act 42 was not largely a product of racial gerrymandering—not one." (J.S. App. 41). The district court, therefore, correctly concluded that "the *direct evidence* that Act 42 was a product of racial gerrymandering is overwhelming." (J.S. App. 43) (emphasis in original).

The court below properly found two independent evidentiary bases to support the finding that Act 42 is the product of racial gerrymandering. As the court correctly concluded, each of these basis "is sufficient on its own to

subject Act 42 to strict scrutiny, and each is consequently sufficient to require Defendants to demonstrate that Act 42 is 'narrowly tailored to further a compelling governmental interest,' as required by *Shaw* and other applicable Equal Protection Clause precedents." (J.S. App. 43).

In other words, this case has everything present in *Shaw* *plus* clear direct evidence and admissions of racial gerrymandering. Or to put it another way, this case is like *Gomillion* with the additional proof of express admissions from every witness that the bizarrely shaped district was, purposely, a racial gerrymander.

D. Appellants Presented No Convincing Evidence To Refute the Conclusion That Louisiana's Congressional Districting Plan Is a Racial Gerrymandering

At the two hearings, appellants mounted only a meager attempt to justify the districting plan as anything other than a racial gerrymander. As stated, every witness at the first hearing candidly admitted that race was the driving, and only, force behind the plan. At the second hearing, which followed closely on the heels of *Shaw*, appellants feebly advanced two post hoc, non-racial rationalizations: partisan/incumbent politics and socioeconomic commonalities. After considering these newly discovered rationales, the district court rejected them both, branding them "wholly unconvincing and in many respects disingenuous." (J.S. App. 26). In the district court's view, appellants presented "no credible evidence supporting" these alleged motivations. (J.S. App. 32). The district court, therefore, properly held that such concerns played no cognizable role in the racial gerrymandering of Louisiana's districts.[4]

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[4] The three-judge court went on to address the issue whether the result in the case would be different if partisan politics had played *any* cognizable role in the creation of a racially gerrymandered district "without for a moment granting that" such

The district court also addressed appellants' only evidence regarding compliance with traditional districting principles, namely, testimony by an expert that District 4, which appears to violate every traditional districting principle, actually possesses "socioeconomic commonality." (J.S. App. 36). However, even appellants admitted at trial that such data was not *actually* considered by the Legislature in drawing District 4. In any event, the court found appellants' argument to be no more than a post hoc rationalization.[5] Specifically, the court held that "the allegedly distinctive socioeconomic profile of District 4 is factually unconvincing, methodologically flawed, irrelevant, and unquestionably a hindsight rationalization of a plan that everyone understands to have been principally designed to create two majority-black districts." (J.S. App. 38).

After its thorough analysis of all the evidence, the district court set forth its unequivocal conclusion:

> As we find that the *only sensible* explanation for the Plan's extreme facial irregularity and its flagrant deviation from traditional districting criteria is that

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political motives were at work with respect to District 4. (J.S. App. 33). The court, however, specifically stated that its discussion of the issue was dicta, and did not in any way affect its holding in the case:

> The Defendants seem to believe that they can defeat a claim of racial gerrymandering under *Shaw*, if *any* factor other than race played *any* cognizable role in the creation of a challenged redistricting plan. Although we need not correct such a misconstruction of *Shaw* to find racial gerrymandering in this case, we briefly address this legal issue—*obiter dictum*—in hopes of shedding a little additional light on this difficult area of the law.

(J.S. App. 34) (emphasis in original). The court concluded, in dicta, that "accurately stated, the question posed by *Shaw* is whether a redistricting plan can be reasonably conceived as the product of non-racial factors. In this case the Plan cannot." (J.S. App. 35).

[5] As the court noted, "[a]ny able statistician who looks at enough statistical characteristics (multivariate analysis) can find something distinctive about any district." (J.S. App. 36).

> the Legislature intentionally segregated voters into congressional districts based on their race, we conclude that the Plaintiffs have *overwhelmingly satisfied their burden of proving racial gerrymandering.*

(J.S. App. 26-27) (emphasis added).

III. LOUISIANA'S DISTRICTING PLAN IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST, AND THEREFORE VIOLATES THE EQUAL PROTECTION CLAUSE

Once plaintiffs met their initial burden of proving that the districting scheme was a racial gerrymander, the district court proceeded to determine whether the plan, despite its questionable nature, was narrowly tailored to serve a compelling governmental interest. The district court noted the rationales advanced by appellants as "compelling interests," but found it unnecessary to analyze these proffered justifications in detail. The district court explained: "As we conclude, however, that Act 42 is not narrowly tailored to further these or any other compelling state interests, we need not decide here whether any one or more of them—properly clarified—is such an interest." (J.S. App. 44). The court assumed, without granting, that the proffered interests were compelling, but concluded that the plan ventured far beyond the requisite precision to serve such interests.

The district court relied, in part, on an example in *Shaw* to illustrate the proper application of the "narrowly tailored" principle: "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression [in the context of § 5 of the Voting Rights Act] if the state went beyond what was reasonably necessary to avoid retrogression." (J.S. App. 47) (quoting *Shaw*, 113 S.Ct. at 2831). In other words, a state must do only what is necessary to serve a compelling interest to meet the "narrowly tailored" requirement. The district court stated the principle more broadly as follows:

> [A]s voters have an equal protection right not to be segregated by their state legislatures or local governments into various voting districts on the basis of race, only a plan that segregates to no greater extent than is reasonably necessary to further a compelling governmental interest can survive constitutional scrutiny. The same can be said for a plan that supersaturates a majority-minority district, while concomitantly depleting adjacent majority-majority districts of minority voters.

(J.S. App. 48).

With regard to the Louisiana plan, the district court correctly found that it contained far more constitutionally suspect segregation than necessary to serve the State's proffered goals. The Louisiana scheme packs more black voters into District 4 than reasonably necessary to afford blacks a realistic chance to determine the outcome of elections, provided they exercise their right to vote. (J.S. App. 48). Further, the court found that the boundaries of the district violate traditional districting principles to a greater extent than reasonably necessary. (J.S. App. 48-49).

In a State where blacks constitute approximately 23 percent of the population, District 4 contains 63 percent black registered voters. "To greater or lesser degrees, all expert witnesses acknowledged—some only reluctantly under cross examination—that 63 percent black voting age population was well in excess of the percentage needed for reasonable comfort in creating a safe voting-age majority-minority district." (J.S. App. 49). In fact, the other majority-minority district created by the Louisiana plan contains 54 percent black voting age citizens, with no substantial differences in the voting patterns of the two districts. (J.S. App. 49).

The court further found that the plan's excessive disregard of traditional districting criteria and its negative effect on a plethora of third party interests provide addi-

tional support for the conclusion that the scheme is not narrowly tailored. (J.S. App. 50) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-511 (1989)); *see also United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 510-515 (1980). The court relied on settled principles in determining that "a plan is not narrowly tailored if it adversely affects more interests, if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest." (J.S. App. 57).

Indeed, the evidence at trial clearly estabished that a second black majority district could have been drawn with substantially less violence to traditional districting principles. (J.S. App. 51). In fact, one state legislator had created just such a plan. (J.S. App. 52). The district court, therefore, concluded that:

> the Plan is *not* narrowly tailored, either relatively or absolutely. This is so because it embraces considerably more racial gerrymandering—and thus more segregation—than is needed to satisfy any advanced state interest, and because the Plan unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests.

(J.S. App. 52-53).

The Louisiana plan is not only a stark racial gerrymander, it is an excessive one. As such, it is not narrowly tailored to serve a compelling state interest.

IV. APPELLANTS' JURISDICTIONAL STATEMENT OFFERS THIS COURT NO REASONS THAT WOULD PREVENT THE COURT FROM GRANTING THIS MOTION TO AFFIRM

Some of the more blatant misstatements and fallacious arguments contained in the Jurisdictional Statement call for a direct response. These are briefly addressed below.

A. The District Court *Did Not* Hold That "Race Could *Never* Be Considered in Redistricting"

Appellants argue that the district court held that there could never by *any* consideration of race in redistricting. (J.S. 9). Not so. At the very beginning of its opinion, the district court states as follows:

> In simplest form, this case poses the question, "Does a state have the *right* to create a racial majority-minority congressional district by racial gerrymandering?" In simplest form, the answer—largely supplied by the United States Supreme Court's opinion in *Shaw v. Reno*, rendered during the pendency of this case—is "Yes, but only if the state does it right."

(J.S. App. 4) (emphasis in original).

Manifestly, the district court recognized a State's legal ability to consider race in districting and even to engage in racial gerrymandering under certain conditions. The court further stated that "*defacto* or accidental segregation is not constitutionally suspect . . . ." (J.S. App. 12, n.13). The court recognized, as stated in *Shaw*, that "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw*, 113 S.Ct. at 2826. District lines, moreover, may be drawn "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Id.* at 2826. Such districts have legitimate purposes, and are not the product of intentional, and therefore constitutionally suspect, racial gerrymandering.

This Court's voting rights jurisprudence, including *Shaw*, establishes that districts that are the product of *intentional* racial segregation are subject to strict scrutiny. Such racial gerrymanders are not absolutely prohibited, but must be narrowly tailored to serve a compelling state interest. Louisiana's bold racial gerrymander is not nar-

rowly tailored. Therefore, it flouts equal protection principles.

B. The District Court's Decision *Is Not* "a Collateral Attack on a Preclearance Decision Made by the Attorney General Pursuant to § 5 of the Voting Rights Act"

Appellants advance the argument that the district court's opinion somehow represents a "collateral attack" on a preclearance decision of the Attorney General. (J.S. 16). This argument is meritless. It mischaracterizes the district court's opinion and mistakenly conflates cases dealing with preclearance of districts under the "nonretrogression" standard of § 5 of the Voting Rights Act with cases addressing constitutional challenges to enacted districting schemes. Had they looked more closely, appellants would have found an unfavorable response to this argument in *Shaw* itself.

There, this Court specifically addressed the issue as follows:

> [O]n remand North Carolina might claim that it adopted the revised plan in order to comply with the § 5 "nonretrogression" principle. Under that principle, a proposed voting change canont be precleared if it will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 47 L.Ed.2d 629 (1976). In *Beer*, we held that a reapportionment plan that created one majority-minority district where none existed before passed muster under § 5 because it improved the position of racial minorities . . . .
>
> Although the Court concluded that the redistricting scheme at issue in *Beer* was nonretrogressive, it did hold that the plan, for that reason, was immune from constitutional challenge.

Shaw, 113 S.Ct. at 2830-31. This Court was unequivocal in *Shaw:* "Indeed, the Voting Rights Act and our case

law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional." *Id.* "[C]overed jurisdictions [do not have] *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Id.*

This case represents a constitutional challenge to a districting scheme; it is not, nor does the district court understand it to be, a challenge to the Attorney General's decisions (1) denying preclearance to the first plan proposed by the Louisiana Legislature, or (2) granting preclearance to Act 42.[6] Appellants seek to blur the clear analytical distinction between § 5 cases on the one hand, and constitutional challenges to voting districts on the other. It is axiomatic that the Attorney General's preclearance of a plan under the somewhat less rigorous "nonretrogression" analysis of § 5 does not insulate the plan from constitutional challenges mounted by citizens whose rights are violated.

C. The District Court *Did Not* Decide That "Predominantly Non-White Districts May Not Constitutionally Exceed 55 Percent Non-White Voters"

Perhaps the most disingenuous mischaracterization in the Jurisdictional Statement is the suggestion that the district court held that the Constitution prevents majority-minority districts from exceeding 55 percent non-white voters. (J.S. 21). This is wrong.

First, District 4 contains 63 percent black voting age citizens. Appellants attempt to blur this statistic by presenting their own misleading statistics agglomerating per-

[6] Appellants seize on a discussion of the Attorney General's actions in this case placed in a footnote by the district court and clearly irrelevant to the district court's ultimate decision. The district court merely expressed its opinion that the Attorney General's Office had greatly overstepped its bounds in this case. But these actions, in any event, are irrelevant to the district court's ultimate disposition of the *constitutional* challenge to Louisiana's districts in this case.

centages of *both* black and Hispanic voting age populations in carefully selected districts.

Second, and more importantly, the three-judge court held only that this plan, in these circumstances and given all of its distinguishing features, is not narrowly tailored to serve a compelling governmental interest. In its analysis, the court considered the fact that in this case, 63 percent represents considerably more racial segregation than necessary to achieve the state's proffered interests. But the district court expressly stated that "it is not the province of this court in this case to establish the demographic specifications of the State's Congressional redistricting plan." (J.S. App. 50).

Far from establishing some sort of "55 percent" bright-line rule, as appellants contend, the district court expressly renounced such bright line rules. It merely held that, on the basis of the entire factual record, 63 percent is too much racial segregation to pass muster under the Equal Protection Clause. The court placed special emphasis on the fact that the other "safe" minority district in Act 42 had precisely the same voting patterns as District 4, but a 54 percent black voting age population. (J.S. App. 17).

D. The District Court *Did Not* "Forbid Consideration of Traditional Districting Criteria Other Than Compactness in Creating Non-White Districts"

Contrary to appellants' fanciful characterizations, the district court did not "forbid" consideration of traditional districting criteria (other than compactness) in creating non-white districts. (J.S. 25). On the contrary, the district court specifically considered every traditional districting criterion in its analysis of the Louisiana plan. *See infra* pp. 12-14; (J.S. App. 28-32).

E. Appellees Hav Standing To Challenge Act 42

Seemingly as an afterthought, appellants toss in a standing objection (J.S. 27). This will not fly.

Louisiana's districting plan violates the rights of all its voters, and the Equal Protection Clause is available to all voters, regardless of race. Indeed, it is well settled that "equal protection analysis is not dependent on the race of those benefitted or burdened by a particular classification." (J.S. App. 7-8) (quoting *Shaw*, 113 S.Ct. at 2829) (citations omitted). Appellants seem to be under the misapprehension that appellees are all white. In fact, although it should not matter, the four appellees are members of three different races. In any event, *Shaw* specifically rejects the notion that voters of certain races may not state a claim under the Equal Protection Clause. *Shaw*, 113 S.Ct. at 2824, 2830 (noting that nothing precludes "white voters (or voters of any other race) from bringing the . . . claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification").

CONCLUSION

"Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* (citations omitted). In *Shaw* as in preceding cases, this Court held that this foundational principle extends into the voting booth. The *Shaw* Court spoke emphatically and powerfully about the dangers of racial gerrymanders:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth

> and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Id. at 2832. In other words, racial gerrymandering of Congressional districts is not a cure at all, but simply more of the disease.

The 1994 Congressional elections approach swiftly, and with them looms a constitutional crisis in Louisiana. To avert such a crisis and to ensure the protection of the constitutional rights of all Louisiana citizens, this Court should promptly consider and resolve this case.

There can, we believe, only be one result in view of the uncontroverted facts of this case and the existing law. The district court properly applied the *Shaw* decision to this case. The judgment of the district court should be affirmed.

Respectfully submitted,

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No. 93-1539

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF LOUISIANA, ET AL., PETITIONERS

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a redistricting plan that contains a majority-minority district is subject to strict scrutiny solely because the legislature that enacted the plan intended to create such a district.

2. Whether the boundaries of District 4 in Louisiana's redistricting plan are so irrational on their face that they can be understood only as an effort to segregate voters into separate voting districts because of their race.

3. Whether the fact that the State could have created a more compact majority-minority district than District 4 establishes that the State's plan is not narrowly tailored to the State's compelling interest of creating a second majority-minority district.

4. Whether the fact that the State could have created a majority-minority district that would give minority voters an opportunity to elect a candidate of their choice, but that had a lower minority population than District 4, establishes that the State's plan is not narrowly tailored to the State's compelling interest of creating a second majority-minority district.

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RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has primary responsibility for the administration and enforcement of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and the United States has substantial responsibility for the enforcement of Section 2 of the Act, 42 U.S.C. 1973. Both of those provisions prohibit a wide range of racially discriminatory electoral practices. Both may require a State, under some circumstances, to draw electoral districts in which members of minority groups protected by the Voting Rights Act constitute a majority. This case raises issues concerning the extent to which the Equal Protection Clause of the Constitution imposes limits on a State's ability to draw such districts. Insofar as those limits preclude a State from pursuing other legitimate

state policies while attempting to comply with the Voting Rights Act, they render voluntary compliance with the Voting Rights Act more difficult. The United States thus has a substantial interest in the issues presented by this case.

STATEMENT

This case concerns a challenge to a congressional redistricting plan adopted by the State of Louisiana following the 1990 census. The three-judge district court held that the plan violated the Equal Protection Clause, enjoined use of the plan in any future elections, and ordered that the terms of individuals elected to the House of Representatives in accordance with the plan shall expire on January 3, 1995.

1. Louisiana has a population of approximately 4.2 million, of whom 30.6% are African-American. African-Americans comprise 28% of the voting age population of Louisiana and nearly 28% of the registered voters. From Reconstruction until the 1980's, African-Americans had not been in the majority in any congressional district in Louisiana. As a result of litigation following the 1980 census, they were in the majority in one of Louisiana's eight congressional districts. See *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983).

In 1991, the Louisiana legislature redistricted the eight Board of Elementary and Secondary Education (BESE) districts, whose boundaries had traditionally parallelled congressional district lines. The new BESE plan created only one district with an African-American majority. Because Louisiana is a covered jurisdiction under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, it must submit any change in its electoral practices or procedures to the United States Department of Justice for preclearance or obtain judicial preclearance.

When the BESE plan was submitted for preclearance, the Assistant Attorney General interposed an objection under Section 5. As explained in his letter to state officials, the objection was based on the facts (1) that Louisiana's African-American population was large enough and compact enough to create two majority African-American districts, and (2) that the State had not carried its burden of proving that its decision to create only one such district did not have a discriminatory purpose. See *Georgia* v. *United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. Ultimately, the State adopted a new BESE plan that contained two majority African-American districts, and the Assistant Attorney General did not interpose an objection to that plan when it was submitted for preclearance.

2. As a result of the 1990 census, the State lost one of its eight congressional seats. Accordingly, during its 1991 and 1992 sessions, the state legislature prepared a congressional redistricting plan. In May, 1992, the legislature enacted a new plan, Act 42 of 1992. J.S. App. 3. That plan creates two majority African-American districts. One of them, District 2, is similar in its boundaries to the majority African-American district in the New Orleans area in the preceding plan. Its voting age population is 56% African-American. *Ibid.* The other majority-minority district, District 4, became the focus of this litigation. It runs from near the northwest corner of the State eastward along the State's northern border, and then south along the Mississippi River to the central portion of the State, where it has three extensions. *Id.* at 56. The voting age population of District 4 is 63% African-American. *Id.* at 5.

3. On July 22, 1992, appellees filed their complaint in this case, alleging that Act 42 violated, *inter alia*, the Equal Protection Clause and the Voting Rights Act. A

three-judge court was convened pursuant to 28 U.S.C. 2284. On August 26-27, 1992, the court held an evidentiary hearing. After the hearing, the court denied appellees' request for an injunction, denied their constitutional claims, and took their Voting Rights Act claims under advisement. J.S. App. 6.

4. On June 28, 1993, this Court decided *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). Since appellees had advanced claims similar to those advanced by the plaintiffs in *Shaw*, the district court requested supplemental briefing concerning the implications of *Shaw* for this case. In August, 1993, the court held a two-day evidentiary hearing to determine whether Act 42 is subject to strict scrutiny under the standards stated in *Shaw* and whether, if it is, it nonetheless complies with the Equal Protection Clause because it is narrowly tailored to further a compelling interest. On December 28, 1993, the court issued an opinion and order holding that Act 42 violates the Equal Protection Clause. J.S. App. 3-75, 89-90.

The court rejected the State's claims that appellees lacked standing, see J.S. App. 7-8; that appellees had not alleged a claim of violation of the equal protection principles on which this Court's decision in *Shaw* v. *Reno* was based, see J.S. App. 8-10; and that the court's interlocutory ruling in 1992 rejecting appellees' constitutional claims foreclosed further litigation of those claims, see *id.* at 10-11.

a. Turning to the merits of appellees' claims, the district court held that "[a] legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." J.S. App. 12. The district court held that such plans are subject to strict scrutiny. *Id.* at 13-14.

In the court's view, *Shaw* v. *Reno* established that racial gerrymandering may be proven "*indirectly* or *inferentially* * * * when districts are so bizarrely shaped that they presumptively bespeak an impermissible purpose." J.S. App. 15; see also *id.* at 18-19. On the other hand, intentional use of race may "also be proved by *direct* evidence that a legislature enacted a districting plan with the specific intent of segregating citizens into voting districts based on their race." *Id.* at 15. The district court found what it believed to be "overwhelming evidence—both *indirect* and *direct*—that [Act 42] is a product of racial gerrymandering." *Id.* at 15.

With respect to the so-called "indirect" method of proof that was at issue in *Shaw* itself, the court found that District 4 is "highly irregular." J.S. App. 27. The court found that the district was barely contiguous at several points. *Id.* at 29-30. The district court also found that District 4 does not respect political subdivision lines, since it includes four whole parishes but only parts of 24 others. *Id.* at 30. And the district court found that District 4 combines people from a wide variety of different ethnic, religious, and linguistic communities, *id.* at 31, people with distinct economic interests, *id.* at 31-32, and people from a variety of geographical and topographical regions, *id.* at 32.

The State argued that District 4 is not subject to strict scrutiny under *Shaw* because the legislature's decision to draw a district with its boundaries, rather than a more compact majority-minority district that could have been drawn, could be explained on the basis of factors other than race. In particular, the State attempted to prove that it had chosen District 4 as it was configured in Act 42—rather than more compact alternatives—because it wanted to protect the seats of incumbents of both parties. Since both District 4 and the

more compact alternatives would have achieved the goal of creating a second majority-minority district, the decision to create the irregular boundaries of District 4 was based on the State's desire to protect incumbent members of its congressional delegation, not on race.

The district court adverted to the State's justification, J.S. App. 33 n.43, but rejected it. In the court's view, the ultimate question under *Shaw* is whether the plaintiff has demonstrated "that the plan cannot be understood without postulating that the legislature was significantly actuated by racial motives." J.S. App. 35 n.46. The court observed that the State's evidence showed at most that "incumbency affected only the general location of the gerrymander that is District 4," *id.* at 33 n.43; "once the decision to create a second minority-majority district had been made," the fact that incumbency played a role in dictating its boundaries and location was, for the court, "irrelevant." *Ibid.*

Turning to what it called the "direct" method of proving racial gerrymandering, the court held that it "need not even consider the kind of indirect or inferential proof approbated in *Shaw*," J.S. App. 39, because "[v]irtually every witness who testified at the Trial * * * either affirmatively stated or accepted as gospel that [Act 42] was drawn with the *specific intent* of ensuring the creation of a second, safe, black majority congressional district." *Id.* at 40. The court concluded that, even if it had misconstrued or misapplied this Court's ruling in *Shaw*, "the *direct evidence* that Act 42 was a product of racial gerrymandering is overwhelming." J.S. App. 43. That was sufficient to subject Act 42 to strict scrutiny and thus to require the State "to demonstrate that Act 42 is narrowly tailored to further a compelling governmental interest." J.S. App. 43. (internal quotation marks omitted).

b. With regard to the existence of a compelling state interest, the State argued that, when it adopted Act 42, it reasonably believed that its failure to create two majority African-American districts would violate Section 2 of the Voting Rights Act and would preclude it from obtaining Section 5 preclearance for the plan. The State argued that the Attorney General's objection to the 1991 BESE plan that contained only one African-American majority district strongly supported that conclusion. The State also argued that it had a compelling interest, in light of the racially polarized voting in the State, in adopting a redistricting plan with two majority-minority districts in order to provide fair opportunities to African-American citizens and to remedy the effects of past discrimination.

The district court assumed that "one or all of [these interests] constitutes a compelling state interest" to include a second majority-minority district in the redistricting plan. J.S. App. 45. But the court held that the plan was not narrowly tailored to further those interests, for two reasons.

First, the court held that District 4 was not narrowly tailored because it "entail[ed] considerably more segregation than is necessary to satisfy the need for a second black majority district." J.S. App. 47. The court found that "a district with a black voting age population of not more than 55% * * * would have been adequate to ensure that blacks could elect a candidate of their choice," *id.* at 50, and that District 4's 63% black voting age population was therefore 8% more than necessary "to satisfy the interest of a second district in which black officials can be readily elected." *Ibid.*

Second, the court held that Act 42 was not narrowly tailored because it "excessive[ly] disregard[ed] * * * traditional redistricting criteria" and "derogat[ed] from

third-party interests." J.S. App. 50. In particular, the court noted that numerous witnesses on both sides, including legislators, state officials, and experts, had testified "that a plan could be devised that would include a second black majority district, yet still be significantly more compact and comport much more closely with other traditional redistricting principles." *Id.* at 52. The court concluded that the plan "unnecessarily violates a host of historically important redistricting principles, thereby adversely affecting countless third party interests." *Id.* at 53.

c. Judge Walter filed a concurring opinion. J.S. App. 57-75. In his view, "[s]ince redistricting along racial lines was a *motivating factor*, Act 42 is subject to strict scrutiny." *Id.* at 69. He also stated his view that each of the State's compelling interests was weak. *Id.* at 74. Finally, he agreed with the panel majority that, even if the State had compelling interests in drawing a second majority-minority district, Act 42 was not narrowly tailored to advance any of those interests. J.S. App. 74.

d. The district court enjoined the State "from holding any future congressional elections based on the plan contained in Act 42." J.S. App. 89. Although it refused to invalidate the 1992 congressional elections held under the plan, it ordered that "the term of office of each member of the United States House of Representatives * * * who represents a district created under the plan in Act 42 * * * shall expire" on January 3, 1995, and that "such terms of office and such districts shall not be extended or carried over into the next Congress in any manner whatsoever." *Id.* at 89-90.

DISCUSSION

The Court should note probable jurisdiction.[1] The opinion of the district court misconstrues this Court's decision in *Shaw* v. *Reno* and decides sev-eral related questions of constitutional law that are likely to be of substantial significance in voting rights litigation throughout the country. These issues should not be resolved without full briefing and argument.

1. The district court held that Act 42 is subject to strict scrutiny solely because race was a factor in its creation. This holding is based on an erroneous analysis of this Court's precedents.

a. The district court adjudicated this case on the premise that a State's decision to create majority-minority districts, without more, requires strict scrutiny under the Equal Protection Clause. As a definition of the term "racial gerrymandering," the court stated that "[a] legislature creates a racially-gerrymandered districting plan when it *intentionally* draws one or more districts along racial lines or otherwise intentionally segregates citizens into voting districts based on their race." J.S. App. 12. The court held that the "bedrock principle underlying the Court's decision in *Shaw* is that racially gerrymandered redistricting plans are subject to * * * strict scrutiny." *Id.* at 13. Since it was conceded in the district court that the State intended, through the enactment of Act 42, to create a second majority-minority district, that "direct evidence," J.S. App. 39, was sufficient, in the court's view, to subject the legislature's plan to strict scrutiny.

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[1] We have been informed that the Louisiana legislature recently enacted a new congressional districting plan that was signed into law by the Governor on April 25, 1994.

The district court's analysis is inconsistent with this Court's decision in *United Jewish Organizations of Williamsburgh, Inc. (UJO)* v. *Carey*, 430 U.S. 144 (1977). In *UJO*, as in this case, it was not disputed that the State had intentionally redistricted to create majority-minority districts. Five of the eight Justices who participated in *UJO* rejected the claim that the mere use of race to create majority-minority districts was unconstitutional, at least absent any contention that the proposed plan had the intent or effect of diluting the majority's voting strength. Justice White, writing for three Justices, explained that the *UJO* plan was constitutional because, although it deliberately used race, it "represented no racial slur or stigma" and it did not "minimize or unfairly cancel out" the voting strength of any racial group. 430 U.S. at 165. Two other Justices agreed that, though the legislature used race, its plan did not violate the Equal Protection Clause because it did not "undervalue[] the political power of white voters relative to their numbers." See *id.* at 179-180 (Stewart, J., joined by Powell, J., concurring in the judgment).

In adverting to this issue in *Shaw*, the Court "express[ed] no view as to whether 'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim." 113 S. Ct. at 2828. But the Court took pains not to overrule *UJO*. The Court noted instead that a *Shaw*-type claim could not have been made in *UJO* because, although the State in *UJO* employed race in redistricting, it had "adhered to traditional districting principles." 113 S. Ct. at 2829. As the Court repeatedly explained, the claim it was recognizing in *Shaw* was the "analytically distinct" claim that depends on the fact that the State created districts so geographically bizarre that they are

explicable only as an act of racial segregation. See 113 S. Ct. at 2830. The district court's holding in this case that the intentional creation of a majority-minority district is subject to strict equal protection scrutiny regardless of the shape of the district is therefore in conflict with this Court's decision in *UJO* and finds no support in *Shaw*.

b. The district court also concluded that Act 42 is subject to strict scrutiny on the basis of what the court termed the "indirect or inferential" method of proof recognized by this Court in *Shaw*. As we explain above, however, *Shaw* does not establish an "inferential" method of proving that race was a factor in a redistricting plan, since such proof would not, by itself, lead to the conclusion that the plan is suspect under the Equal Protection Clause. Instead, *Shaw* recognized the "analytically distinct" claim that a plan that departs from traditional redistricting criteria so substantially that *on its face* it rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race is subject to strict scrutiny.

This case presents a substantial question concerning when it may be said that the irregular features of a district "can be understood only as an effort to segregate voters into separate voting districts because of their race," thus calling for strict scrutiny. *Shaw*, 113 S. Ct. at 2832. The district court apparently believed that the irregular shape of a district calls for strict scrutiny unless the district's shape "can be wholly and alternately explained as a product of" non-racial factors. J.S. App. 35.[2] The State, on the other hand, conceded that

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[2] See also J.S. App. 35 (if the plan "can be reasonably conceived as the product of non-racial factors"); *id.* at 34 (if it "can be wholly

it had the objective of creating a second majority-minority district. But, the State argued, the specific configuration of District 4 could be explained on the basis of other factors, such as the protection of incumbents. Although the district court recognized that the State may have shown "that incumbency affected * * * the general location of * * * District 4," *id.* at 33 n.43, it did not investigate or find relevant the extent to which such non-racial factors may have determined the final shape of District 4. This case thus presents the question of whether the application of strict scrutiny turns on the extent and manner in which non-racial factors governed the drawing of irregular district lines.

2. Assuming that Act 42 should be subjected to strict scrutiny, the district court erred in holding that it was not narrowly tailored.

a. The district court assumed that the State had a compelling interest in creating two majority-minority districts, and appellees do not take issue with that assumption in their motion to affirm. As the case comes before this Court, therefore, it must be assumed that the State had a "strong basis in evidence," *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989), for believing that its redistricting plan would dilute the votes of African-Americans in violation of Section 2 of the Voting Rights Act if the plan did not include a second majority-minority district.[3] It must also be assumed that, had the

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explained to be the product of one or more factors other than race"); *id.* at 36 (if it "can be explained entirely without reference to racial gerrymandering").

[3] In a lengthy footnote, J.S. App. 17-22 n.21, the district court criticized the bases for the State's belief that a plan with only one majority-minority district would have violated Section 2. In our view, the district court was mistaken, because it based its finding on the fact that District 4, because of its irregular shape, would not

State not created a second majority-minority district, the State would have had a strong basis for believing that it would have been unable to obtain Section 5 preclearance of the plan from the Attorney General—a result that would have left the State, less than six months prior

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have satisfied the "compactness" precondition of *Thornburg* v. *Gingles*, 478 U.S. 30, 46-47 (1986). A Section 2 challenge, however, would have been based on the possibility that a second sufficiently compact majority African-American district could have been drawn, not on the fact that District 4 as drawn was compact. The district court elsewhere found that a substantially more compact alternative to District 4 was possible. See J.S. App. 51-52.

In the same footnote, the district court accepted that the State had a reasonable basis for believing that the Attorney General would have interposed a Section 5 objection to a plan with only one majority-minority district. J.S. App. 18 n.21. But the court criticized the potential bases for any such objection and argued that the State should not have relied on the possibility of such an objection in deciding whether to create a second majority-minority district. In our view, none of the court's criticisms are well founded. By focusing on "retrogression" objections under Section 5, the court simply ignored the fact that Section 5 objections may be based on "purpose" as well. See 42 U.S.C. 1973c; *City of Richmond* v. *United States*, 422 U.S. 358 (1975). And it is surely a premise of the Section 5 scheme that a State may rely on the interposition of a Section 5 objection in determining whether it must create a majority-minority district. In any event, the District Court for the District of Columbia is the only court that may determine whether a voting change has met the preclearance standards of Section 5. See *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977).

Since the district court went on to decide the case on the basis of an assumption that the State did have a compelling interest in creating a second majority-minority district in order to comply with Sections 2 and 5, and since appellees have not challenged that assumption in their motion to affirm, this case does not present any question to this Court concerning the validity of the compelling interests asserted by the State.

to the 1992 election, with no legally valid congressional districts.

The district court held that Act 42 was not narrowly tailored to satisfy this compelling state interest in creating a plan that included a second majority-minority district. The district court based its holding on two features: the fact that "a second black majority district could have been drawn that would have done substantially less violence to traditional redistricting principles," J.S. App. 51, and the fact that District 4 had "significantly more [African-American voters] than are needed to elect representatives of their choice," *id.* at 49.

b. The district court's finding that narrow tailoring was absent because Act 42 contained districts that were more irregular than they had to be in order to create a second majority-minority district is incorrect. Although it appears true that, in theory, the State could have adopted a redistricting plan with a second majority African-American district that reflected greater respect for traditional redistricting criteria, such a plan would not have satisfied the State's other legitimate interests in this case. For the State here sought not merely to create a second majority African-American district; it also sought to protect existing incumbents, each of whom "did what he could to keep his traditional geographic base." J.S. App. 33 n.43. Cf. *Burns* v. *Richardson*, 384 U.S. 73, 89 n.16 (1966); *White* v. *Weiser*, 412 U.S. 783, 791 (1973). That desire to protect incumbents determined "the general location of * * * District 4" by "pushing the * * * second black majority district generally as far north and east as possible," so that it followed "the northern boundary of Louisiana with Arkansas and the eastern boundary of Louisiana, *i.e.*, the Mississippi River." J.S. App. 33 n.43.

In seeking to comply with the Voting Rights Act by drawing a majority-minority district, a State should be free to weigh other legitimate interests in deciding where and how to draw the district. The State's decision in this case to attach greater importance to protecting incumbents than to other traditional redistricting criteria does not make its plan any less narrowly tailored to its compelling interest in drawing a second majority-minority district. Accordingly, the district court erred in relying on the fact that a more compact district could have been drawn to find that Act 42 was insufficiently narrowly tailored.

c. The other basis for the district court's holding that Act 42 was not narrowly tailored was that, in the court's view, it contained too many minority voters. In voting rights cases, courts have long debated what proportion of minority citizens must be in a district before it offers them a genuine opportunity to elect candidates of their choice in a setting characterized by racially polarized voting. That question, of course, cannot be answered with scientific precision and even a rough answer depends on the facts of a particular case. But the percentage that the State used here—63%—is well within the range of answers that the courts have adopted in similar circumstances. See, *e.g.*, *Ketchum* v. *Byrne*, 740 F.2d 1398, 1413-1417 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Jeffers* v. *Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990), aff'd mem., 498 U.S. 1019 (1991).

In this case, the district court noted that 63% of the registered voters in District 4 were African-Americans. The court recognized that "it is not the province of this court in this case to establish the demographic specifications of the State's congressional redistricting plan." J.S. App. 50. But the court nonetheless found that "a black voting age population of not more than 55%—and

probably less—would have been adequate to ensure that blacks could elect a candidate of their choice." *Ibid.* In the court's view, the plan thus "packs" an additional 8% minority voting age population into the district than would have been necessary to achieve the State's compelling interest in creating a second black majority district. *Id.* at 48. On that basis, the court held that the plan was not sufficiently narrowly tailored.

Initially, the bare fact that a district has a specific minority population proves nothing at all. If it were concluded that the inclusion of the additional minority voters had caused the legislature to adopt a plan with "irrational" or "bizarre" borders rather than a more compact alternative, the additional minority population might be relevant to the *Shaw* inquiry. The district court, however, made no findings on that issue in this case.

More significantly, the district court's decision puts the State in an unfortunate straitjacket. The court assumed that the State had a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act by drawing a second majority-minority district. But the court held that the State's efforts to comply with its legal obligations became unconstitutional because the State misapprehended the precise number of minority voters that should be included in that district. Such judicial second-guessing of a State's judgment—especially where the State used a number well within the range that has ordinarily been thought appropriate in such situations—is not required by the Equal Protection Clause. And it is inconsistent with this Court's recognition that voluntary compliance with the law, especially by States, should be encouraged, not penalized. See, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277-278 (1986) (plurality opinion); *id.* at 290-291

(O'Connor, J., concurring in part and concurring in the judgment); *id.* at 305 (Marshall, J., dissenting).

Finally, there is no reason to believe that the incremental increase of 8% in the percentage of minority voters caused any distinct harm to any of the interests protected by *Shaw*. Especially in circumstances like those present in this case, it is unlikely that the additional minority population in District 4 had any effect on "the perception that members of the same racial group * * * think alike, share the same political interests, and will prefer the same candidates at the polls." 113 S. Ct. at 2827. Nor would it be likely to increase the extent to which "elected officials * * * believe that their primary obligation is to represent only the members of [the minority] group, rather than their constituency as a whole." 113 S. Ct. at 2827. Nor did the district court make any finding that what it termed the "packing" of a small number of additional minority voters in District 4 diluted the minority vote elsewhere in the State sufficiently to make out an independent claim of vote dilution. In the absence of any such finding that the additional minority population in District 4 caused any injury to any interest protected by the Equal Protection Clause, the district court's conclusion that the district was not narrowly tailored because it contained too many minority voters should be rejected.

3. The legal issues determined by the district court in this case are of very substantial significance. Initially, the court's holding that *any* use of race in drawing districts renders the resulting plan constitutionally suspect casts doubt on districting plans adopted by States and local governments throughout the country. Even if that erroneous holding were ignored, however, the district court's decision in this case reaches a number of other legal issues of great importance.

The district court's narrow tailoring rulings effectively amount to a requirement that a State or local government, when creating a majority-minority district in order to satisfy its legal obligation to do so, may create only the most compact and contiguous district possible and the one with the least possible margin of minority population. Thus, a governmental entity that must draw a majority-minority district would be largely disabled from pursuing the numerous non-racial interests that legitimately drive redistricting decisions,[4] if those interests would lead to creation of a more irregular district or would increase its minority population. Since state and local governments may well opt for litigation if their efforts are so narrowly circumscribed, the ultimate effect could be a serious disincentive to settlements and voluntary compliance with the law.

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[4] See, *e.g.*, *Gaffney* v. *Cummings*, 412 U.S. 735, 754 (1973) (fair allocation of power between political parties); *Mahan* v. *Howell*, 410 U.S. 315, 328 (1973) (preservation of political boundaries); *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983) (maintaining residential patterns); *Burns* v. *Richardson*, 384 U.S. 73, 89 n.16 (1966) (minimizing contests between incumbents).

CONCLUSION

The Court should note probable jurisdiction of the appeal.

Respectfully submitted.

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v.

RAY HAYS, *et al.*,
Appellees.

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APPELLEES' RESPONSE TO THE BRIEF OF THE UNITED STATES AMICUS CURIAE

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APPELLEES' RESPONSE TO THE BRIEF OF THE UNITED STATES AMICUS CURIAE

INTRODUCTION

A fair reading of the government's amicus curiae submission suggests this: the United States simply refuses to accede to *Shaw v. Reno*, 113 S.Ct. 2816 (1993). That is not all. Its result-oriented analysis features an unadmirable set of misrepresentations about the three-judge district court's holding, which faithfully applies *Shaw* to this case. The government's ill-founded arguments tell us much about the Justice Department's lack of admiration for *Shaw*, as well as its willingness to indulge in provocative advocacy, but these arguments do not at all illuminate the specific issue before this Court.

This case is about as bad as it gets; Louisiana has engaged in an egregious racial gerrymander without sufficient justification. The undisputed facts—in particular, the geography of District 4—place this case four-square

within the narrowest possible reading of *Shaw*. These facts permit only one conclusion: Louisiana's Congressional districting scheme is so wildly irregular and so provocatively unfaithful to traditional districting principles that it is precisely what it appears to be—an unjustified effort to segregate the races for voting purposes. *See Shaw*, 113 S.Ct. at 2824. As explained in detail in the district court's opinion and in Appellees' Motion To Affirm, Louisiana's Congressional districting scheme represents a stark, brazen racial gerrymander not narrowly tailored to serve any proffered state interest (even assuming, arguendo, that these proffered state motives rise to the level of "compelling interests").

In light of this flinty reality, the government provides no real response to the arguments set forth in Appellees' Motion To Affirm. Although most of the government's arguments have already been addressed and rejected by the district court, and by *Shaw* itself, Appellees submit this Response to reiterate why this Court should summarily affirm the district court's decision.

ARGUMENT

I. THE GOVERNMENT'S BRIEF MISREPRESENTS THE HOLDING OF THE DISTRICT COURT

Our first point is this: the government completely contorts the holding of the district court. Sadly, many of the same misrepresentations that riddled Appellants' Jurisdictional Statement have infected the government's submission as well. The following examples demonstrate this unfortunate and unflattering truth. The government claims "the district court held that Act 42 is subject to strict scrutiny *solely because race was a factor in its creation.*" Brief Amicus Curiae, at 9 (emphasis added). Another broadside: "[t]he district court adjudicated this case on the premise that a State's decision to create majority-minority districts, *without more,* requires strict scrutiny under the Equal Protection Clause." *Id.* (emphasis added). Still again, the government describes the district court's

holding this way: "the intentional creation of a majority-minority district is subject to strict equal protection scrutiny *regardless of the shape of the district* . . . . *Id.* at 11 (emphasis added). None of this is true.

First, the district court was confronted with a Congressional districting scheme so irregular on its face that it could only be explained as the product of racial gerrymandering. Thus, relying on *Shaw*, the district court merely reiterated that "racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race[,]" and that such plans "violate the Equal Protection Clause of the Fourteenth Amendment unless they are narrowly tailored to further a compelling governmental interest." J.S. App. 13 (citing *Shaw*, at 2825, 2832). This Court has now seen the unprecedented, bizarre contours of District 4—the 600 mile long Z slashed across almost the entire State of Louisiana. As a Congressional district, it drives any unbiased observer armed with the undisputed facts of record ineluctably to one conclusion: racial gerrymandering.

Second, the district court *did not hold*, as the government would have it, that if race plays *any* factor in the drawing of districts, the Equal Protection Clause is violated. Nor did the court hold that majority-minority districts violate the Equal Protection Clause regardless of their shape. On the contrary, the district court specifically recognized a State's right to create majority-minority voting districts in certain circumstances. J.S. App. 4; Motion to Affirm, at 21. The district court further held—even putting aside the overwhelming direct evidence of racial gerrymandering—that the particular districting scheme at issue here is so extremely irregular that it could only be the product of racial gerrymandering. J.S. App. 43. The court thus concluded, after careful analysis, that the plan could not survive strict scrutiny because it was not narrowly tailored even to a presumptively compelling governmental interest.

To its credit, the government concedes that "*Shaw* recognized the 'analytically distinct' claim that a plan that departs from traditional redistricting criteria so substantially that *on its face* it rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race is subject to strict scrutiny." *Brief of Amicus Curiae,* at 11. But the government then tries to muddy the water by suggesting that strict scrutiny can be avoided if other "legitimate" factors, such as "protecting incumbents," affect in some way, however negligibly, the contours of the racially segregated districts. *Brief of Amicus Curiae,* at 15.

In the end, the government appears to retreat from this claim, saying only that "this case thus presents the question" whether such negligible influences can defeat application of strict scrutiny. *Brief of Amicus Curiae,* at 12. The government has good reason for being tentative. *Shaw,* at the very least, means that contorted district boundaries enclosing a racially skewed population, without more, create a presumption that strict scrutiny applies. The government's diffident suggestions that other factors may have played some minor role in shaping District 4 are insufficient to defeat this presumption.

II. THE GOVERNMENT RELIES PRIMARILY ON ARGUMENTS REJECTED IN *SHAW*

The government relies almost exclusively on *United Jewish Organizations of Williamsburgh, Inc. (UJO) v. Carey,* 430 U.S. 144 (1977). Indeed, its argument is drawn almost directly from the pages of Justice White's dissent in *Shaw*. But that battle was fought last Term, and the resolution reached in *Shaw's majority* opinion now controls. To understand why the government's never-say-die argument cannot prevail, the Court need only look to *Shaw* itself, which considered and rejected the same argument now warmed-over and served up again.

Shaw sets forth a lengthy analysis of *UJO* that directly and unequivocally contradicts the government's argument: "[N]othing in the Court's highly fractured decision in

UJO—on which the District Court almost exclusively relied, and which the dissenters evidently believe controls—forecloses the claim we recognize today." 113 S.Ct. at 2829. As this Court recognized, *UJO* did *not* involve the claim presented both in *Shaw* and here—a challenge to a districting plan that on its face is so highly irregular that it rationally can be understood only as an effort to segregate voters by race. *Id.* The distict court made clear that this case stated the identical claim recognized in *Shaw*:

> The narrow holding of *Shaw* is that a citizen states a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face, so bizarrely shaped and convoluted, "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ." There is no question that the Plaintiffs make such allegations in their complaint.

J.S. App. at 7. Just as in *Shaw*, "*UJO*'s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality." *Shaw* 113 S.Ct. at 2829. This Court plainly recognized a distinction that the government refuses to accept:

> *UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. But it did not purport to overrule *Gomillion* or *Wright*. Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.

Id.

UJO does not control this case. *Shaw* does.

III. LOUISIANA'S DISTRICTING PLAN IS NOT NARROWLY TAILORED

The government contends that even if strict scrutiny applies, Louisiana's districting plan is "narrowly tailored" to serve a compelling governmental interest. The government thus disputes the district court's holding—which it made in reliance upon *Shaw* and other settled precedent —that Louisiana's plan is not narrowly tailored because: (i) it contains far more racial segregation than is reasonably necessary to serve the State's alleged compelling interests; and (ii) it grievously violates every traditional districting criterion, and far more so than necessary, even assuming the State's proffered interest in drawing a second majority-minority district is indeed compelling. The government offers two responses to the district court's holding. Neither is persuasive.

First, the Justice Department argues that a 63% minority population is "narrowly tailored." In supporting this contention, the government advances the same arguments made by the Appellants. We have addressed and rebutted these in the Motion To Affirm. Motion to Affirm, at 18-20. The Department's main mistake is its assumption that the district court established some sort of bright line population rule with respect to the "narrowly tailored" analysis. Conveniently, the government relies on this misinterpretation to argue that the district court must be incorrect because there have been other cases (in different circumstances) where districts with similar population levels have been upheld.

The district court, however, did just the opposite of what the government says it did. The district court established no bright line rules, but instead conducted the "narrowly tailored" analysis in the only way it can be done—on an individual basis given the particular facts of each case. The court looked at all of the circumstances of this districting scheme—including its extreme violations of every traditional districting principle—to determine that

it was not narrowly tailored. In its analysis, the court pointed out that a 63% minority population in District 4 seemed to be excessive, given the particular facts of *this* case, because the other majority-minority district in Louisiana's scheme had identical voting characteristics but required only a 54% minority population. Accordingly, in this case, 63% is excessive and well beyond the bounds of what is necessary.

This is also why the government's comparison to cases involving other districting plans is unavailing. It may be that in those cases, given all of the particular facts, the plans could be considered "narrowly" tailored. But simply isolating population percentages from cases and districting plans with vastly different features serves no real comparative purpose. Moreover, not only does the government improperly accuse the district court of establishing a bright line population rule to strike down the plan, but the government then immediately tries to establish its own bright line rule in order to uphold the plan. This is plainly wrong. The point is that the "narrowly tailored" standard requires a case-specific analysis. Here, the districting scheme is clearly excessive. Therefore, it violates the Equal Protection Clause.

Second, the government throws in the novel argument that Louisiana's segregated districts can be sustained on the basis of governmental interests that are not compelling, or even important, but are, more modestly, "legitimate." In its view, "a State should be free to weigh other *legitimate* interests in deciding where and how to draw [a segregated] district." Brief Amicus Curiae, at 15 (emphasis added). The proposition that racial segregation may be justified by "legitimate" interests mocks not only *Shaw*—which reaffirmed that strict scrutiny means a statute must be "narrowly tailored to further a *compelling* governmental interest," *Shaw*, 113 S.Ct. at 2816 (emphasis added) —but this Court's precedents generally. Indeed, Justices who have advocated relaxed scrutiny of "remedial" racial

classifications have still insisted that such classifications serve "*important* governmental objectives." *See, e.g., Richmand v. J.A. Croson, Co.*, 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (emphasis added). Giving weight under strict scrutiny to interests that are not compelling, nor even important, would effect a constitutional revolution that no Justice has advocated.

But even if the Court were inclined to overthrow precedent, this case provides poor ground indeed for staging such a revolution. The purported "legitimate" interest invoked by the United States on Act 42's behalf—so-called "protection of incumbents"—is little more than a euphemism for "interests" the Court has declared illegitimate under the Constitution itself. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986) (allegation of "political gerrymandering" states a justiciable claim under the Equal Protection Clause); *Williams v. Rhodes*, 393 U.S. 23 (1968) (laws disenfranchising political newcomers can violate the Equal Protection Clause). Finally, as the district court concluded, this recently discovered state interest in "protection of incumbents" amounts to little more than post hoc rationalization.

In sum, Louisiana's racially gerrymandered plan is not narrowly tailored to any state interests, even assuming for the sake of argument that those interests are compelling. It therefore violates the Equal Protection Clause.

IV. SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S DECISION WILL AVOID UNCERTAINTY IN THE UPCOMING ELECTION

The 1994 Congressional elections approach swiftly, and the deadlines associated with this election create added time pressure requiring immediate consideration of this case. The time for qualifying as a candidate for Representative ends on July 29, 1994—less than three months from now. The primary elections are scheduled for October 1, 1994. The sooner this Court rules, the sooner an accept-

able remedial districting plan can be adopted, approved, and implemented. The State's recent action in adopting a new plan suggests that the State is not presently anticipating further elections under the now-discredited plan invalidated by the district court; nonetheless, the State has not seen fit to withdraw this appeal challenging the demonstrably correct application of *Shaw* to this case. Under these circumstances, this Court's summary affirmance of the district court's decision would introduce a significant measure of certainty into a confused and complicated electoral situation.

CONCLUSION

The United States presents no new argument that counsels against summary affirmance. For the reasons previously stated, the district court's judgment should be summarily affirmed.

Respectfully submitted,

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No. 93-1539

In The

Supreme Court of the United States

October Term, 1993

STATE OF LOUISIANA, et al.,

Appellants,

vs.

RAY HAYS, et al.,

Appellees.

On Appeal From A Three-Judge Panel Of The United States District Court For The Western District Of Louisiana

SUPPLEMENTAL BRIEF REGARDING MOOTNESS

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SUPPLEMENTAL BRIEF REGARDING MOOTNESS

This is an appeal from an order of the three-judge court enjoining further use of the Louisiana congressional districting plan enacted in 1992. That plan, contained in Act 42 of the 1992 Louisiana Legislature, was codified in La. Rev Stat. 18:1276.3. Subsequent to the filing of the Jurisdictional Statement and Motion to Affirm in this case, the 1992 districting plan was repealed.

On April 22, 1994, the governor of Louisiana signed into law Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature. Section 2 of the Act provides: "Revised Statute 18:1276.3 is hereby repealed." Section 1 of the 1994 Act establishes new congressional district lines.[1] On April 29, 1994, the state submitted this new redistricting plan to the United States Department of Justice for preclearance under section 5 of the Voting Rights Act. If the 1994 redistricting plan is approved by the Department of Justice, the controversy underlying the decision below and the instant appeal will be moot.

The injunction issued by the district court was narrowly framed to apply only to the now repealed 1992 districting plan:

---

[1] Under the 1994 plan, the black voter age population of District 4 has been reduced to 55%. This is the reduction in the number of blacks which the district court suggested and the appellees had sought. See Motion to Affirm, pp. 19, 24. Also the shape and location of the new district 4 are significantly different from its prior incarnation. Unlike the prior district, the new one follows the path of the Red River through the center of the state, and is no longer, as described by the district court, "Z-shaped".

> [We] declare Act 42 of 1992 to be unconstitutional and the districting plan embodied therein to be null and void; and we enjoin the State of Louisiana from holding future congressional elections based on the plan.

(J.S. 54) The district court injunction neither imposed any requirement regarding any future districting plans nor directed that any such plans be submitted for judicial approval. If preclearance of the 1994 plan is obtained, because it repeals the prior plan, the State of Louisiana could not enforce the superceded 1992 plan even if the decision of the district court were overturned by this court.

Because the Department of Justice has not yet acted on the state's request for preclearance of the 1994 plan, we suggest the Court defer action on the Jurisdictional Statement and Motion to Affirm. We will promptly notify the Clerk of Court if preclearance is obtained, which should occur before the end of the current term. At that juncture the appropriate course would be for the Court to vacate as moot the decision of the district court and

remand. *Hall v. Beals*, 396 U.S. 45, 50 (1969); *Berry v. Davis*, 242 U.S. 468, 470 (1917).

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RESPONSE TO THE STATE OF LOUISIANA'S BRIEF REGARDING MOOTNESS

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RESPONSE TO THE STATE OF LOUISIANA'S BRIEF REGARDING MOOTNESS

This appeal is not moot, for four separate reasons articulated in the Argument portion of this Response. Louisiana now contends that its own appeal of a district court order invalidating its bizarre, uncouth, congressional districting scheme has been mooted by the enactment of a new regime in response to that very order. *See* Act No. 1, Louisiana 1994 Second Extraordinary Legislative Session ("Act No. 1"). Instead of simply dismissing its appeal, the State would have this Court dismiss the appeal for mootness, apparently in hopes that it can secure vacatur of the lower court's adverse decision. *See Appellants' Supplemental Brief Regarding Mootness* at 2-3 ("*Mootness Brief*"). As demonstrated below, Louisiana's strategic attempt to employ mootness doctrines to

undermine an unfavorable trial-court decision directly conflicts with this Court's mootness jurisprudence.

PROCEDURAL BACKGROUND

Plaintiffs in this case, citizens of the State of Louisiana, brought an equal protection challenge to that State's congressional districts. Plaintiffs argued that the districting scheme adopted in response to the 1990 reapportionment was unconstitutional as a purposeful segregation of voters on the basis of race. On December 28, 1993, a special three-judge panel of the United States District Court of the Western District of Louisiana agreed. In a careful, well-reasoned opinion, the three-judge court struck down the districting scheme and enjoined the State from conducting any future elections pursuant to it. Now, the State argues that its appeal of that decision has been mooted by the recent enactment of Act No. 1—the congressional districting plan created to replace the one invalidated by the district court.

At the outset, Louisiana implies that the work of the court below is at an end. *Cf. Mootness Brief* at 2. That is not so. In their prayer for relief, plaintiffs specifically asked that the Louisiana legislature be compelled to "effectuate a lawful plan" under the Equal Protection Clause and the Voting Rights Act. Complaint, Prayer for Relief ¶ 5. To date, the district court has not held the new districting regime "lawful," nor has it denied plaintiffs-appellees' prayer for relief. Until either event occurs, enactment of a new plan means only that the case has entered a new remedial phase, not that it is over.

ARGUMENT

This Court should reject Louisiana's mootness claim on four separate grounds.

First, under the circumstances presented here, the mootness issue is controlled by *Whitcomb v. Chavis,* 403 U.S. 124 (1971). *Whitcomb* presented an equal protection challenge by African-American voters to an Indiana legislative districting scheme. While the case was pending before this Court, the Court was "advised by the parties that the Indiana Legislature had passed, and the Governor had signed, new apportionment legislation soon to become effective for the [upcoming] elections." *Id.* at 140. In response to this turn of events, the Court held that the case was "not moot." *Id.* at 141. It relied on the fact that "the District Court . . . retained jurisdiction to pass on the legality of subsequent apportionment statutes" and that "the issue involved in the present litigation would simply reappear for decision" were the case mooted. *Id.* at 140-41. Here, as in *Whitcomb,* the district court retains jurisdiction, and the issues presented by this appeal will inevitably reappear as that court considers subsequent plans, such as the regime embodied in Act No. 1 now trumpeted by the State. But Act No. 1 signals only the beginning of a new chapter in this litigation, not the end. The case remains actively, vibrantly, alive.[1]

Second, it is well established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Fla. Chapter of Associated*

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[1] Indeed, the district court has acknowledged the continuing vitality of the case; it did so in *denying* plaintiffs' motion to impose a deadline for legislative enactment of a constitutional plan. *Hays v. Louisiana,* No. CV 92-1522 S (W.D. La. Jan. 20, 1994). Had the court considered the case closed, as Louisiana implies, *cf. Mootness Brief* at 2, it would have *dismissed* plaintiffs' motion or otherwise indicated that it was not in order.

Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2301 (1993) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).[2] At least since *City of Mesquite*, the Court has applied this principle to challenged legislative acts. Its reason for doing so is straightforward: A defendant's "repeal of [constitutionally] objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *City of Mesquite*, 455 U.S. at 289.

This salutary principle was reiterated by this Court in *Northeastern Florida Contractors*. There, a contractors association mounted an equal protection challenge to a Jacksonville ordinance according preferential treatment to certain minority-owned businesses in the awarding of city contracts. After this Court granted certiorari, Jacksonville repealed the challenged ordinance and replaced it with an alternative scheme to ensure minority participation in city contracts. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.*, 113 S. Ct. at 2300. Concluding that the case was "not moot," the Court examined the character of the replacement legislation:

> This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. . . . The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but . . . it disadvantages them in the same fundamental way.

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[2] *City of Mesquite* involved a challenge to a city ordinance regulating licensing of amusement establishments. The District Court struck down a portion of the ordinance requiring the city to consider an applicant's "connections with criminal elements" when deciding whether to grant a license. While the case was pending before the Court of Appeals, however, the contested language was eliminated from the ordinance. On certiorari, this Court relied upon established voluntary-cessation principles and held that the case should not be dismissed as moot.

Id., at 2301. Where replacement legislation remains at all constitutionally suspect, a court is precluded from finding that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"; hence, it is precluded from finding mootness. *City of Mesquite*, 455 U.S. at 289, n.11 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

In this case, a preliminary review of the new Louisiana districts suggests that they may have been drawn along racial lines in a way that needlessly transgresses parish boundaries. Plaintiffs have already challenged the new districting plan in the district court and have asked the district court to enjoin the State from holding elections under the new regime. Motion for Preliminary Injunction and Adoption of an Interim Congressional Districting Plan for the 1994 Congressional Elections in the State of Louisiana, *Hays v. Louisiana*, No. CV 92-1522 S (W.D. La. Jun. 17, 1994). Thus, the dispute between plaintiffs and Louisiana has not abated. Under such circumstances, this Court should apply the rule of *Northeastern Florida Contractors*.

Third, this Court has hesitated to allow defendants intentionally to undermine adverse court decisions through manipulation of mootness doctrines. For example, in a case where the Massachusetts legislature reacted to an adverse ruling in similar fashion—repealing and replacing a law that had been voided on constitutional grounds—a majority of this Court refused to find mootness. *See Massachusetts v. Oakes*, 491 U.S. 576, 585-88 (1989) (Scalia, J., concurring). Of course, the Court's holdings in this area might be viewed simply as applications of the familiar rule that issues are justiciable where they are "capable of repetition, yet evading review." *See, e.g., Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)).

Those principles are fully applicable here. The district court was constitutionally bound in this case to permit Louisiana to redraw its own districts. *See Growe v. Emison,* 113 S. Ct. 1075, 1080-81 (1993). Now that Louisiana has been allowed to act in the first instance, this Court is being told that the very actions taken to comply with the district court's order require that order's vacatur. Under Louisiana's view, a State may always disembowel a pesky decision simply by timing the completion of its role in fashioning a remedy to coincide with the appeal of the finding of a constitutional violation. That sort of legerdemain is in conflict not only with common sense, but also with the precept that compliance with a judgment pending appeal does not render a case moot. *See Gray v. Sanders,* 372 U.S. 368, 375-76 (1963); *see also* Robert L. Stern et al., Supreme Court Practice 718 (7th ed. 1993). Under any of several doctrines, then, this case should be resolved on the merits.[3]

Fourth, even if Louisiana could overcome this Court's mootness precedents, it still should not win the vacatur garland it so assiduously seeks. Although vacatur can be appropriate where a case is mooted on appeal through "happenstance," *see United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950), this "*Munsingwear* procedure is inapplicable" where the "controversy did not become moot due to circumstances unattributable to any of the parties."[4] *Karcher v. May,* 484 U.S. 72, 83 (1987). Simply

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[3] The precedents relied on by Louisiana, *see Mootness Brief* at 3, are inapposite. In *Hall v. Beals,* 396 U.S. 45, 49 (1969), the plaintiffs had challenged a state residency requirement that, upon amendment, no longer adversely affected them; likewise, *Berry v. Davis,* 242 U.S. 468 (1917)—a seventy-seven-year-old, mandatory-vasectomy case—also involved a situation where "the substituted act," *i.e.,* the amended law, did "not apply to the plaintiff." *Id.* at 470. Here, by contrast, the new districts apply to these plaintiffs, and their injury will continue undiminished until a lawful districting plan is in place.

[4] This Court expected to have occasion earlier this term to address *Munsingwear*'s application to cases rendered moot by a set-

put, "[an] appellate court should not vacate the judgment below if the case has become moot due to the voluntary act of the losing party." *Manufacturers Hanover Trust v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993) (Kearse, J.) (*citing Karcher*); *accord New Left Educ. Project v. Board of Regents of the Univ. of Texas Sys.*, 472 F.2d 218 (5th Cir.), *summarily rev'd Board of Regents of the Univ. of Texas Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973). "If [courts] were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow that party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won." *Manufacturers Hanover*, 11 F.3d at 383. Because it was Louisiana that took the action that purportedly mooted this appeal, Louisiana can not rely on that action to overturn a decision adverse to it.[5]

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tlement agreement, but it was forced to dismiss as improvidently granted the petition for certiorari in the case presenting the issue. *Izumi Seimitsu Kogyo Kabushiki v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). The Court is again scheduled to address settlement-prompted vacatur next term in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 114 S. Ct. 681 (*cert. granted* Jan. 10, 1994) (No. 93-714). There, the Court has directed the parties to brief and argue the question: "Should the rule announced in *United States v. Munsingwear*, 340 U.S. 36 (1950), extend to cases that become moot in this Court because of the voluntary settlement of the parties?" *U.S. Bancorp*, No. 93-714 (Mar. 28, 1994). Because Louisiana's mootness allegations in this case are not based on a settlement agreement, cases such as *Izumi* and *U.S. Bancorp* have no application here.

[5] Nor is the short opinion *per curiam* in *Crowell v. Mader*, 444 U.S. 505, 506 (1980), to the contrary. In *Crowell*, a party who had *prevailed* below and who had not been responsible for the intervening events giving rise to apparent mootness presented a mootness claim to this Court. Because in these circumstances the possibility of strategic behavior was not presented, the Court acceded that party's request for dismissal for mootness and ordered vacatur. Here, by contrast, appellees vigorously deny that the case is moot and urge this Court to reach the merits.

CONCLUSION

For the reasons set forth above, this Court should not vacate as moot the judgment of the district court. Rather, because neither the State of Louisiana nor the United States has presented any substantial arguments to the contrary, this Court should summarily affirm the district court's judgment.

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No. 93-1539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OF LOUISIANA, *et al.*,
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from a Three Judge Panel
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APPE SPONSE TO THE BRIEF OF
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STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Western District of Louisiana

APPELLEES' RESPONSE TO THE BRIEF OF THE UNITED STATES AMICUS CURIAE

INTRODUCTION

A fair reading of the government's amicus curiae submission suggests this: the United States simply refuses to accede to *Shaw v. Reno*, 113 S.Ct. 2816 (1993). That is not all. Its result-oriented analysis features an unadmirable set of misrepresentations about the three-judge district court's holding, which faithfully applies *Shaw* to this case. The government's ill-founded arguments tell us much about the Justice Department's lack of admiration for *Shaw*, as well as its willingness to indulge in provocative advocacy, but these arguments do not at all illuminate the specific issue before this Court.

This case is about as bad as it gets; Louisiana has engaged in an egregious racial gerrymander without sufficient justification. The undisputed facts—in particular, the geography of District 4—place this case four-square

within the narrowest possible reading of *Shaw*. These facts permit only one conclusion: Louisiana's Congressional districting scheme is so wildly irregular and so provocatively unfaithful to traditional districting principles that it is precisely what it appears to be—an unjustified effort to segregate the races for voting purposes. *See Shaw*, 113 S.Ct. at 2824. As explained in detail in the district court's opinion and in Appellees' Motion To Affirm, Louisiana's Congressional districting scheme represents a stark, brazen racial gerrymander not narrowly tailored to serve any proffered state interest (even assuming, arguendo, that these proffered state motives rise to the level of "compelling interests").

In light of this flinty reality, the government provides no real response to the arguments set forth in Appellees' Motion To Affirm. Although most of the government's arguments have already been addressed and rejected by the district court, and by *Shaw* itself, Appellees submit this Response to reiterate why this Court should summarily affirm the district court's decision.

ARGUMENT

I. THE GOVERNMENT'S BRIEF MISREPRESENTS THE HOLDING OF THE DISTRICT COURT

Our first point is this: the government completely contorts the holding of the district court. Sadly, many of the same misrepresentations that riddled Appellants' Jurisdictional Statement have infected the government's submission as well. The following examples demonstrate this unfortunate and unflattering truth. The government claims "the district court held that Act 42 is subject to strict scrutiny *solely because race was a factor in its creation.*" Brief Amicus Curiae, at 9 (emphasis added). Another broadside: "[t]he district court adjudicated this case on the premise that a State's decision to create majority-minority districts, *without more*, requires strict scrutiny under the Equal Protection Clause." *Id.* (emphasis added). Still again, the government describes the district court's

holding this way: "the intentional creation of a majority-minority district is subject to strict equal protection scrutiny *regardless of the shape of the district* . . . . *Id.* at 11 (emphasis added). None of this is true.

First, the district court was confronted with a Congressional districting scheme so irregular on its face that it could only be explained as the product of racial gerrymandering. Thus, relying on *Shaw*, the district court merely reiterated that "racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race[,]" and that such plans "violate the Equal Protection Clause of the Fourteenth Amendment unless they are narrowly tailored to further a compelling governmental interest." J.S. App. 13 (citing *Shaw*, at 2825, 2832). This Court has now seen the unprecedented, bizarre contours of District 4—the 600 mile long Z slashed across almost the entire State of Louisiana. As a Congressional district, it drives any unbiased observer armed with the undisputed facts of record ineluctably to one conclusion: racial gerrymandering.

Second, the district court *did not hold*, as the government would have it, that if race plays *any* factor in the drawing of districts, the Equal Protection Clause is violated. Nor did the court hold that majority-minority districts violate the Equal Protection Clause regardless of their shape. On the contrary, the district court specifically recognized a State's right to create majority-minority voting districts in certain circumstances. J.S. App. 4; Motion to Affirm, at 21. The district court further held—even putting aside the overwhelming direct evidence of racial gerrymandering—that the particular districting scheme at issue here is so extremely irregular that it could only be the product of racial gerrymandering. J.S. App. 43. The court thus concluded, after careful analysis, that the plan could not survive strict scrutiny because it was not narrowly tailored even to a presumptively compelling governmental interest.

To its credit, the government concedes that "*Shaw* recognized the 'analytically distinct' claim that a plan that departs from traditional redistricting criteria so substantially that *on its face* it rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race is subject to strict scrutiny." *Brief of Amicus Curiae*, at 11. But the government then tries to muddy the water by suggesting that strict scrutiny can be avoided if other "legitimate" factors, such as "protecting incumbents," affect in some way, however negligibly, the contours of the racially segregated districts. *Brief of Amicus Curiae*, at 15.

In the end, the government appears to retreat from this claim, saying only that "this case thus presents the question" whether such negligible influences can defeat application of strict scrutiny. *Brief of Amicus Curiae*, at 12. The government has good reason for being tentative. *Shaw*, at the very least, means that contorted district boundaries enclosing a racially skewed population, without more, create a presumption that strict scrutiny applies. The government's diffident suggestions that other factors may have played some minor role in shaping District 4 are insufficient to defeat this presumption.

II. THE GOVERNMENT RELIES PRIMARILY ON ARGUMENTS REJECTED IN *SHAW*

The government relies almost exclusively on *United Jewish Organizations of Williamsburgh, Inc. (UJO) v. Carey*, 430 U.S. 144 (1977). Indeed, its argument is drawn almost directly from the pages of Justice White's dissent in *Shaw*. But that battle was fought last Term, and the resolution reached in *Shaw's majority* opinion now controls. To understand why the government's never-say-die argument cannot prevail, the Court need only look to *Shaw* itself, which considered and rejected the same argument now warmed-over and served up again.

Shaw sets forth a lengthy analysis of *UJO* that directly and unequivocally contradicts the government's argument: "[N]othing in the Court's highly fractured decision in

UJO—on which the District Court almost exclusively relied, and which the dissenters evidently believe controls—forecloses the claim we recognize today." 113 S.Ct. at 2829. As this Court recognized, *UJO* did *not* involve the claim presented both in *Shaw* and here—a challenge to a districting plan that on its face is so highly irregular that it rationally can be understood only as an effort to segregate voters by race. *Id.* The distict court made clear that this case stated the identical claim recognized in *Shaw*:

> The narrow holding of *Shaw* is that a citizen states a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face, so bizarrely shaped and convoluted, "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ." There is no question that the Plaintiffs make such allegations in their complaint.

J.S. App. at 7. Just as in *Shaw*, "*UJO*'s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality." *Shaw* 113 S.Ct. at 2829. This Court plainly recognized a distinction that the government refuses to accept:

> *UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. But it did not purport to overrule *Gomillion* or *Wright*. Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.

Id.

UJO does not control this case. *Shaw* does.

III. LOUISIANA'S DISTRICTING PLAN IS NOT NARROWLY TAILORED

The government contends that even if strict scrutiny applies, Louisiana's districting plan is "narrowly tailored" to serve a compelling governmental interest. The government thus disputes the district court's holding—which it made in reliance upon *Shaw* and other settled precedent—that Louisiana's plan is not narrowly tailored because: (i) it contains far more racial segregation than is reasonably necessary to serve the State's alleged compelling interests; and (ii) it grievously violates every traditional districting criterion, and far more so than necessary, even assuming the State's proffered interest in drawing a second majority-minority district is indeed compelling. The government offers two responses to the district court's holding. Neither is persuasive.

First, the Justice Department argues that a 63% minority population is "narrowly tailored." In supporting this contention, the government advances the same arguments made by the Appellants. We have addressed and rebutted these in the Motion To Affirm. Motion to Affirm, at 18-20. The Department's main mistake is its assumption that the district court established some sort of bright line population rule with respect to the "narrowly tailored" analysis. Conveniently, the government relies on this misinterpretation to argue that the district court must be incorrect because there have been other cases (in different circumstances) where districts with similar population levels have been upheld.

The district court, however, did just the opposite of what the government says it did. The district court established no bright line rules, but instead conducted the "narrowly tailored" analysis in the only way it can be done—on an individual basis given the particular facts of each case. The court looked at all of the circumstances of this districting scheme—including its extreme violations of every traditional districting principle—to determine that

it was not narrowly tailored. In its analysis, the court pointed out that a 63% minority population in District 4 seemed to be excessive, given the particular facts of *this* case, because the other majority-minority district in Louisiana's scheme had identical voting characteristics but required only a 54% minority population. Accordingly, in this case, 63% is excessive and well beyond the bounds of what is necessary.

This is also why the government's comparison to cases involving other districting plans is unavailing. It may be that in those cases, given all of the particular facts, the plans could be considered "narrowly" tailored. But simply isolating population percentages from cases and districting plans with vastly different features serves no real comparative purpose. Moreover, not only does the government improperly accuse the district court of establishing a bright line population rule to strike down the plan, but the government then immediately tries to establish its own bright line rule in order to uphold the plan. This is plainly wrong. The point is that the "narrowly tailored" standard requires a case-specific analysis. Here, the districting scheme is clearly excessive. Therefore, it violates the Equal Protection Clause.

Second, the government throws in the novel argument that Louisiana's segregated districts can be sustained on the basis of governmental interests that are not compelling, or even important, but are, more modestly, "legitimate." In its view, "a State should be free to weigh other *legitimate* interests in deciding where and how to draw [a segregated] district." Brief Amicus Curiae, at 15 (emphasis added). The proposition that racial segregation may be justified by "legitimate" interests mocks not only *Shaw*—which reaffirmed that strict scrutiny means a statute must be "narrowly tailored to further a *compelling* governmental interest," *Shaw*, 113 S.Ct. at 2816 (emphasis added) —but this Court's precedents generally. Indeed, Justices who have advocated relaxed scrutiny of "remedial" racial

classifications have still insisted that such classifications serve "*important* governmental objectives." *See, e.g., Richmand v. J.A. Croson, Co.*, 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (emphasis added). Giving weight under strict scrutiny to interests that are not compelling, nor even important, would effect a constitutional revolution that no Justice has advocated.

But even if the Court were inclined to overthrow precedent, this case provides poor ground indeed for staging such a revolution. The purported "legitimate" interest invoked by the United States on Act 42's behalf—so-called "protection of incumbents"—is little more than a euphemism for "interests" the Court has declared illegitimate under the Constitution itself. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986) (allegation of "political gerrymandering" states a justiciable claim under the Equal Protection Clause); *Williams v. Rhodes*, 393 U.S. 23 (1968) (laws disenfranchising political newcomers can violate the Equal Protection Clause). Finally, as the district court concluded, this recently discovered state interest in "protection of incumbents" amounts to little more than post hoc rationalization.

In sum, Louisiana's racially gerrymandered plan is not narrowly tailored to any state interests, even assuming for the sake of argument that those interests are compelling. It therefore violates the Equal Protection Clause.

IV. SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S DECISION WILL AVOID UNCERTAINTY IN THE UPCOMING ELECTION

The 1994 Congressional elections approach swiftly, and the deadlines associated with this election create added time pressure requiring immediate consideration of this case. The time for qualifying as a candidate for Representative ends on July 29, 1994—less than three months from now. The primary elections are scheduled for October 1, 1994. The sooner this Court rules, the sooner an accept-

able remedial districting plan can be adopted, approved, and implemented. The State's recent action in adopting a new plan suggests that the State is not presently anticipating further elections under the now-discredited plan invalidated by the district court; nonetheless, the State has not seen fit to withdraw this appeal challenging the demonstrably correct application of *Shaw* to this case. Under these circumstances, this Court's summary affirmance of the district court's decision would introduce a significant measure of certainty into a confused and complicated electoral situation.

CONCLUSION

The United States presents no new argument that counsels against summary affirmance. For the reasons previously stated, the district court's judgment should be summarily affirmed.

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